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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BRIGHTON COLLECTIBLES, INC., a
Delaware corporation,

Plaintiff,

vs.

RK TEXAS LEATHER MFG., INC., a Texas
corporation; K&L IMPORTS, INC., a
California corporation; NHW, INC., a Texas
corporation; YK TRADING, INC., a Texas
corporation; JCNY, a New Jersey corporation;
JOY MAX TRADING, INC., a California
corporation; AIF CORPORATION, a Texas
corporation; and DOES 1 through 10,

Defendants.

AND RELATED THIRD PARTY ACTION.

Case No. 10-CV-00419-CAB-WVG

**SUPPLEMENTAL DECLARATION OF
DAVID W. SWIFT IN SUPPORT OF
DEFENDANT NHW'S MOTION FOR
SUMMARY ADJUDICATION AS TO
PLAINTIFF'S LOST PROFIT DAMAGES**

[REPLY TO MOTION FOR SUMMARY
ADJUDICATION FILED CONCURRENTLY
HEREWITH]

Hearing Date: August 23, 2012
Hearing Time: 2:30 p.m.
Hearing Room: 12

The Hon. Cathy Ann Bencivengo

DECLARATION OF DAVID SWIFT

I, David Swift, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am an attorney with Kinsella Weitzman Iser Kump & Aldisert LLP, attorneys of record for Defendant NHW, Inc. ("NHW"). If called as a witness, I could and would competently testify to all facts within my personal knowledge except where stated upon information and belief.

2. Attached hereto as Exhibit A is a true and correct copy of excerpts of the deposition of Plaintiff's expert, Dr. Robert Wunderlich

3. Attached hereto as Exhibit B is a true and correct copy of a transcription of the Ninth Circuit oral argument in *Brighton Collectibles, Inc. v. Coldwater Creek, Inc.*, Nos. 09-55624, 09-56038, before Judges McKeown, Fletcher W., and Clifton that took place on January 13, 2011 in Pasadena, California. It is my understanding that the parties settled the action for a confidential amount prior to the Ninth Circuit issuing an opinion on the matter.

I declare under penalty of perjury that the foregoing is true and correct to the best of my personal knowledge.

Executed September 28, 2012, in Santa Monica, California.

/s/ David Swift
David W. Swift

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EXHIBIT A

Robert Wunderlich, Ph.D.

May 10, 2012

1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BRIGHTON COLLECTIBLES, INC.,
a Delaware corporation,

Plaintiff,

vs.

CASE NO. 10CV0419-AJB-WVG

RK TEXAS LEATHER MFG., INC.,
d/b/a TEXAS LEATHER
MANUFACTURING, a Texas
corporation; K&L IMPORTS,
INC., a California
corporation, et al.,

Defendants.

~~~~~

VIDEOTAPED DEPOSITION OF  
ROBERT WUNDERLICH, Ph.D.

May 10, 2012

9:15 a.m.

515 South Flower Street  
Suite 1100  
Los Angeles, California

Dawn Schetne, CSR No. 5140



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Robert Wunderlich, Ph.D.

May 10, 2012

52

1 look at my first report.

2 Q. I will tell you, to save you time, that my  
3 understanding is that it incorporates the copyright and  
4 the trade dress. I'm not sure about the trademark.

5 A. Well, it's in a schedule in my report. You  
6 know, there's several defendants here. I certainly  
7 haven't memorized all of my tables.

8 Q. Well, before you do that, because I don't think  
9 it's necessary, let me ask the question this way: Do  
10 you know whether the sales of the Brighton products that  
11 embodied the copyrights, trademarks, trade dress which  
12 were allegedly infringed upon went up or down or  
13 remained the same from the time before the alleged  
14 infringing period to the time when the alleged  
15 infringement began?

16 A. I haven't looked at that.

17 Q. You haven't looked at that. Do you know  
18 whether Brighton's gross sales went up or down from the  
19 time -- well, let's ask it differently. Do you know  
20 whether Brighton's gross sales of all products went up  
21 or down during the allegedly infringing periods?

22 A. There is a schedule that addresses that.

23 Q. Let's take a look at that one.

24 A. My C series of schedules --

25 Q. Are we still on Exhibit 2000, the April 23rd



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Robert Wunderlich, Ph.D.

May 10, 2012

117

1 think you have to look -- and I haven't tried to do this  
2 quantitatively, but more closely at the particular  
3 circumstances.

4 Q. Okay. And in your rather lengthy answer to  
5 that, you used the word "could" I think three or four  
6 times. You really don't know, but it's a possibility,  
7 is what you're testifying to; correct?

8 A. I'm testifying that it possibly could affect  
9 the consumers differently if the products were being  
10 offered through an upscale store.

11 Q. And as far as a woman who might see an  
12 allegedly infringing bag, do you differentiate between  
13 the type of woman who might see it, such as a woman that  
14 comes from a household that makes \$300,000 a year as  
15 opposed to one that comes from a household that makes  
16 \$25,000 a year, or a homeless woman?

17 A. I'm not differentiating.

18 Q. Okay. Did you do any sort of valuation  
19 analysis -- well, in the context of goodwill, do you  
20 understand what a valuation analysis is?

21 A. Yes.

22 Q. Okay. And would it be like you're assigning a  
23 value to Brighton's goodwill in its damaged state, and  
24 then you compare it to an evaluation had there been no  
25 infringement? Would that be a correct definition?



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Robert Wunderlich, Ph.D.

May 10, 2012

118

1 A. One could conceivably in some cases calculate a  
2 diminution in value, yes.

3 Q. Have you done that for your report?

4 A. No.

5 Q. Is it common to do that sort of a thing?

6 MR. MONAGLE: I'm -- go ahead. I'm sorry.

7 MR. HELLER: Yeah, the word common is not a  
8 good one, if that's where you were going.

9 MR. MONAGLE: I missed the question a couple  
10 questions back, but don't worry about it. Sorry.

11 MR. HELLER: Okay. You know, why don't we take  
12 a break. Does that sound good? A lunch break. Does  
13 that work, Peter, if we can disturb you from your --

14 MR. ROSS: I'm too busy.

15 MR. MacLEMORE: He's playing Angry Birds.

16 MR. HELLER: Let's go off the record.

17 THE VIDEO OPERATOR: We're off the record at  
18 12:05 P.M.

19 \* \* \*

20 LUNCHEON RECESS

21 \* \* \*

22 THE VIDEO OPERATOR: We're back on the record  
23 at 1:14 P.M.

24 BY MR. HELLER:

25 Q. Good afternoon, Mr. Wunderlich. Would you



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May 10, 2012

197

1 are different numbers for the different categories.

2 Q. So you've used the 2.06 units per transaction  
3 and applied it to the 60 percent of sales of Brighton  
4 product sold through boutiques?

5 A. At the wholesale level. Well, yes, 60 percent  
6 of Brighton wholesale sales that subsequently are sold  
7 through boutiques, I have applied that same factor.

8 Q. Did you do any calculations to what are  
9 normally called corrective advertising?

10 A. I've looked at the amount of advertising --  
11 marketing and advertising expenditures by Brighton, but  
12 I have not done a -- so I've added those up, but I  
13 haven't expressed a corrective advertising opinion.

14 Q. Do you know what corrective advertising is?

15 A. Generally speaking, yes.

16 Q. Have you ever been told that Brighton incurred  
17 costs for corrective advertising?

18 A. Have I ever been told that? I don't think one  
19 way or the other. Not one way or the other.

20 Q. Have you ever heard the term girlfriend  
21 marketing?

22 A. Say that again.

23 Q. Have you ever heard the term girlfriend  
24 marketing?

25 A. Not specifically. I mean, I guess I could



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# **EXHIBIT B**

**In The Matter Of:**

***BRIGHTON COLLECTIBLES, INC.***

***v.***

***COLDWATER CREEK, INC.***

---

***ARGUMENT, ORAL - Vol. 1***

***January 13, 2011***

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**MERRILL CORPORATION**

**LegalLink, Inc.**

20750 Ventura Boulevard  
Suite 205  
Woodland Hills, CA 91364  
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ORAL ARGUMENT - 1/13/2011

Page 1

IN THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Nos. 09-55624 & 09-56038 (Consolidated)

---

BRIGHTON COLLECTIBLES, INC.,

Plaintiff-Appellee,

v.

COLDWATER CREEK, INC.,

Defendant-Appellant.

---

On Appeal from the United States District Court  
for the Southern District of California  
Case No. 06-CV-1848-H(POR)  
District Judge Marilyn L. Huff

ORAL ARGUMENT

JANUARY 13, 2011

HELD BEFORE:

JUDGE M. MARGARET McKEOWN, PRESIDING

JUDGE WILLIAM A. FLETCHER

JUDGE RICHARD R. CLIFTON

TRANSCRIBED BY: MELANIE M. FAULCONER

CSR No. 6420

ORAL ARGUMENT - 1/13/2011

Page 2

1 PASADENA, CALIFORNIA

2 JANUARY 13, 2011

3 ORAL ARGUMENT

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6

7 CATHERINE E. STETSON, ESQ.: Thank you, your  
8 Honors. Good morning, and may it please the Court. My  
9 name is Cate Stetson, representing Coldwater Creek.

10 Can I set aside five minutes for rebuttal,  
11 please?

12 JUDGE MCKEOWN, PRESIDING: Yes. You have a clock  
13 there, and I'll also try to look and help you.

14 CATHERINE E. STETSON, ESQ.: Okay. Thank you.

15 We've raised a number of issues in our  
16 briefing, but in the time we have this morning, I'd like  
17 to focus on what I think are the three predominant legal  
18 issues.

19 Issue Number One, of course, is the thin  
20 copyright question, whether the Court erred when it  
21 instructed the jury that the jury need only find  
22 substantial similarity.

23 Issue Number Two of law is the trade dress  
24 question, which is whether the Court committed error  
25 when it instructed the jury that it could find -- for

ORAL ARGUMENT - 1/13/2011

Page 3

1 the defendant on the trade dress question if it found  
2 secondary meaning without separately instructing the  
3 jury that if the trade dress is generic, there is no  
4 protection full stop.

5 The third issue, of course, is damages, which  
6 is whether this expert for Brighton correctly put in  
7 front of the jury relevant data and supported his  
8 theories of damages with substantial evidence so that  
9 the jury in a lost profits case could have some clarity  
10 and satisfaction that the damages it awarded were  
11 actually within some reasonable approximation of  
12 damages.

13 So taking it from the top on the copyright  
14 issue, it's the law of this Court -- Harper House and  
15 Apple and Mattel -- that unoriginal elements of a work  
16 are not protectable.

17 So the question in this case is, when you have  
18 a silver heart design where all of the individual  
19 component pieces of that heart themselves are concededly  
20 not original and not protectable, what you have then is  
21 what this Court calls a "thin copyright."

22 The copyright exists. The work certainly is  
23 protectable. There was a Brighton designer who designed  
24 this heart and there was a copyright conferred on -- on  
25 Brighton for this heart.

ORAL ARGUMENT - 1/13/2011

Page 4

1 But the question is, outside of that particular  
2 selection or assembly of elements, how far does the  
3 copyright extend?

4 And what Harper House and Apple and to a  
5 certain extent Satava versus Lowry teach, it teaches  
6 that in order for another work, another silver  
7 decorative heart to infringe, that silver heart has to  
8 look virtually identical to the heart that has the  
9 copyright protection.

10 JUDGE McKEOWN, PRESIDING: Well, I think it really  
11 depends on how you read Apple and these other cases  
12 because, as I read them, the question is, if you have  
13 unprotectable elements in and of themselves but you put  
14 them together and you have a compilation, then you have  
15 to figure out, well, with that compilation how many  
16 different ways might one do that? Is there just one  
17 way, like the Skye vodka bottle or something like that,  
18 a tile or something, some of the other cases the Court  
19 has looked or there are multiple ways?

20 So it's not simply because you have  
21 unprotectable elements that are put together doesn't  
22 mean you move to the virtual identical -- identity  
23 standard.

24 So I'd appreciate your response to the argument  
25 of Brighton, which is, "Well, there's" -- they use the

ORAL ARGUMENT - 1/13/2011

Page 5

1 "gazillion" because it's been used in one of the  
2 cases --

3 CATHERINE E. STETSON, ESQ.: Right, right.

4 JUDGE McKEOWN, PRESIDING: -- "there's a gazillion  
5 ways you can -- can make these fanciful hearts and  
6 doodads and other things that go with them."

7 So what is your response to that?

8 CATHERINE E. STETSON, ESQ.: Well, my response is,  
9 I think Brighton is overreading Mattel. The "gazillion"  
10 phrase comes from Mattel (unintelligible), and what  
11 Mattel relied on for this -- this notion of the breadth  
12 or narrowness of "protectability" was Page 1139 of  
13 Apple. And I commend it to you specifically because  
14 this is what the Apple Court says:

15 "When the range and protectable and  
16 unauthorized expression is narrow, the  
17 appropriate standard for elicit copying is  
18 virtual identity."

19 So we're talking about circumstances where the  
20 range of "protectable expression" -- and this is  
21 unprotectable -- is narrow.

22 How many different ways can this expression,  
23 this combination be carried out? The standard is  
24 virtual identity.

25 There is a little bit of --

ORAL ARGUMENT - 1/13/2011

Page 6

1 JUDGE FLETCHER: Why do you say that there's a  
2 limited number of ways?

3 I mean, given you've got a heart shape, but it  
4 seems to me there are lots of things you can do with a  
5 heart shape.

6 Why is a heart shape different from a doll  
7 face, for example?

8 CATHERINE E. STETSON, ESQ.: Uh-huh.

9 There are certainly a number of different  
10 things you can do with a heart shape.

11 And if you look at record excerpts 236 and 237,  
12 this is the conversation that Coldwater's counsel had  
13 with the designer of the Brighton heart. And what she  
14 says I think is -- is telling and very instructive on  
15 the legal issue here, which is, "This is my heart. I  
16 designed it."

17 There have been elements of roping and flower  
18 buds and scrolls all throughout silver design for, you  
19 know, decades if not hundreds of years. In fact, you  
20 know, in design generally these elements are common.

21 If you look over to the left, you see roping on  
22 the plaster. If you look above your head, you see  
23 scrolls. If you look to the right, you see chevrons.

24 What the designer of the Brighton heart did was  
25 to take all those elements and put it together. That's



ORAL ARGUMENT - 1/13/2011

Page 7

1 her work.

2 But it is only copyrightable to the extent that  
3 if someone comes along and makes a heart that is  
4 virtually identical to that heart, then copyright is  
5 infringed.

6 JUDGE FLETCHER: What does -- what does vir- --

7 I mean, I'm sympathetic to your argument. I  
8 mean, we're -- we're having to do things in words. But  
9 in fact we're talking about something visual.

10 CATHERINE E. STETSON, ESQ.: Right, right.

11 JUDGE FLETCHER: And to what extent can we kind of  
12 cut passed the words to the underlying purpose of these  
13 tests, which I think in this context really is, "Does  
14 someone looking at one heart think that he or she is  
15 really looking at the same heart when she's actually --  
16 he or she is actually look at the other one?"

17 CATHERINE E. STETSON, ESQ.: Sure.

18 JUDGE FLETCHER: And if you put things side by side,  
19 okay, one has little dots and the other one has ropes.

20 CATHERINE E. STETSON, ESQ.: Right, right.

21 JUDGE FLETCHER: The chevron shape in the middle of  
22 the heart is a little different from one to the next. I  
23 understand that.

24 Virtually identical doesn't quite capture the  
25 notion of, is the average or even the attentive viewer

ORAL ARGUMENT - 1/13/2011

Page 8

1 seeing one without the other the other one immediately  
2 to the side going to be confused?

3 CATHERINE E. STETSON, ESQ.: Uh-huh.

4 It's true just starting from your comment about  
5 words having sort of a limited function. I think  
6 that's --

7 JUDGE FLETCHER: When we're dealing with -- in the  
8 end we're dealing with something visual. Yeah.

9 CATHERINE E. STETSON, ESQ.: True. And I'd  
10 emphasize too that it's difficult even on this paper  
11 record to appreciate what even Brighton's heart designer  
12 and the chief marketing officer conceded were  
13 differences between these two hearts.

14 You have at record excerpts 271 a concession by  
15 Brighton's chief marketing officer that these two hearts  
16 are not identical.

17 JUDGE FLETCHER: Of course they're not. Of course  
18 they're not identical.

19 JUDGE McKEOWN, PRESIDING: If that were the symbol  
20 or if that were the standard, you might have had a  
21 different -- might have had a different result --

22 CATHERINE E. STETSON, ESQ.: Yes.

23 JUDGE McKEOWN, PRESIDING: -- as far as their  
24 identical.

25 CATHERINE E. STETSON, ESQ.: I think that's right.

ORAL ARGUMENT - 1/13/2011

Page 9

1           And just as an aside, I know this Court was --  
2       was interested in discussing the harmless error question  
3       with respect to civil jury instructions.

4           On -- on either jury instruction that is the  
5       main focus of these arguments, either on thin copyright  
6       or on trade dress, which we can discuss later on, it  
7       plainly was not harmless error in part because of that  
8       very testimony. In certain --

9           JUDGE McKEOWN, PRESIDING: Apart -- apart from the  
10      general cases that talk about the thin copyright, the  
11      virtual identity, is there any case that you can  
12      think of that most closely approximates this  
13      amalgamation that is the heart in this case?

14      CATHERINE E. STETSON, ESQ.: I think the best case,  
15      your Honor, is actually the very thorough Walker &  
16      Zanger case out of the Northern District of California.  
17      You tend to -- I'm choosing that because I think it is a  
18      very detailed recitation of this Court's precedence.  
19      It's relatively recent. It's from 2007. It has to do  
20      with tile, which your Honor mentioned earlier. And what  
21      it concluded on the copyright right issue -- it's  
22      actually instructive on both copyright and trade dress,  
23      but on the copyright right issue what it said was, there  
24      is with respect to a few of these tile designs, not all  
25      of them, some modicum of originality that was brought

ORAL ARGUMENT - 1/13/2011

Page 10

1 into a sort of public domain or common tile design, but  
2 the copyright is thin because it only extends to protect  
3 that originality.

4 That I think is the most apropos comparison to  
5 a product design.

6 JUDGE McKEOWN, PRESIDING: But of course on  
7 copyright law, originality doesn't have the same meaning  
8 that it does, for example, in patent law.

9 CATHERINE E. STETSON, ESQ.: True.

10 JUDGE McKEOWN, PRESIDING: "Originality" means "I  
11 didn't copy it from him."

12 CATHERINE E. STETSON, ESQ.: Right. Something --  
13 something that grew out of an idea.

14 JUDGE McKEOWN, PRESIDING: As opposed to that "I  
15 dreamed up something so totally unusual that no one else  
16 had dreamed it up."

17 I mean, you don't need that kind of originality  
18 in copyright.

19 CATHERINE E. STETSON, ESQ.: Correct.

20 JUDGE McKEOWN, PRESIDING: So that's why again the  
21 words -- sometimes we run into the problems with the  
22 words when we're really talking about visual  
23 depictions.

24 So it is original in -- in terms of what was  
25 put together. The question is -- because it was not

ORAL ARGUMENT - 1/13/2011

Page 11

1 copied from another source directly, the question then  
2 is, the degree of protection, you know, from -- from  
3 virtual to substantial.

4 CATHERINE E. STETSON, ESQ.: Right.

5 JUDGE McKEOWN, PRESIDING: And I guess I'm looking  
6 for some other products or designs that might fall in  
7 this category.

8 CATHERINE E. STETSON, ESQ.: Sure.

9 Well, in addition to the tile design out of  
10 Walker & Zanger, you have some rug designs in the  
11 Tufenkian case out of the Second Circuit.

12 But I think probably most apropos to the  
13 compilation question we're confronting here is Harper  
14 House in addition to Apple, which we've discussed a  
15 little bit, but Harper House is the case involving an  
16 organizer, and what the Ninth Circuit concluded was that  
17 in a case where you have standing alone unoriginal  
18 elements -- and, Judge McKeown, you're certainly right  
19 that "unoriginal" means something different in copyright  
20 law than it does in patent. It doesn't have to be new  
21 or novel -- but when you have unoriginal elements, the  
22 assemblage of those elements, the compilation is what --  
23 is what is protectable and is the only thing that is  
24 protectable.

25 What the Brighton silver heart designer here

ORAL ARGUMENT - 1/13/2011

Page 12

1 created was a protectable design, but it was only  
2 protectable as to her design. As she says in her  
3 testimony, "This is my heart. I put it together."

4 The fact that other people have used roping or  
5 chevron or flower buds or scrolls or dots or hearts is  
6 irrelevant because it's her design that's copyrighted.

7 But the flip side of that, it's only her design  
8 that's copyrighted.

9 And the reason I'm going back to your question,  
10 Judge Fletcher, about the -- the -- the reasons behind  
11 this kind of constraint that they put on visual design,  
12 I think the Court's earlier precedence and those from  
13 the Second Circuit, which appears to be, you know, the  
14 the hotbed of its own copyright litigation, the reason  
15 for this has to do with the notion that particularly  
16 when you're talking about design of products and you're  
17 talking about a copyright or a trade dress, which can be  
18 forever, you want to be very careful not to 'fence off'  
19 from other designs, other innovations, even competition  
20 the core elements of any particular industry or trade.

21 The fact that this heart was made out of  
22 elements that are common in this industry, common in  
23 silversmithing is itself too broad an idea for them to  
24 'fence off' anything other than the heart that Brighton  
25 designed.

ORAL ARGUMENT - 1/13/2011

Page 13

1 JUDGE McKEOWN, PRESIDING: Could you move on to the  
2 trade dress issue and the jury instruction referencing  
3 "generic"?

4 CATHERINE E. STETSON, ESQ.: Sure.

5 The jury instruction referencing generic, the  
6 reason it was faulty has to do with -- with what the  
7 instruction did not say. And this is at record excerpt  
8 117, and here's what the judge instructed:

9 "A generic mark or trade dress without  
10 secondary meaning does not receive trademark  
11 protection."

12 And then there's a an example of a "generic"  
13 word, which of course is hard, as you said, Judge  
14 Fletcher, to translate over to visual protection.

15 "A product design is generic if it is  
16 so common that it cannot be identified with a  
17 particular source. A claim of trade dress for  
18 a product design requires proof of secondary  
19 meaning."

20 And that was legal error.

21 What the Court should have instructed the jury  
22 and what Coldwater Creek sought for the jury to be  
23 instructed was that a generic trade dress does not  
24 receive protection full stop.

25 Now, here again we run into some -- some

ORAL ARGUMENT - 1/13/2011

Page 14

1 different strains of nomenclature when it comes to the  
2 question "What is generic?" in trade dress.

3 When you have of a trademark, when you have a  
4 word it's relatively easy to explain, and the Court  
5 explained to this jury what a generic word is. You  
6 can't trademark the word "hamburger" because it's too  
7 generic.

8 With "trade dress" the question is a little bit  
9 different, and the question as -- courts have explored  
10 this issue and have described it is, "Are you trying in  
11 your claim of trade dress elements to" -- again I'll use  
12 the phrase -- "'fence off' too many things to your own  
13 intellectual property protection?"

14 So here if you look at our record excerpts,  
15 there is a description in the response to  
16 interrogatories about what exactly were the elements of  
17 trade dress that Brighton is claiming.

18 And the elements of trade dress were a silver  
19 heart in conjunction with two or more of the following  
20 elements, including cowhide or leather or brocade or  
21 other silver hearts. At various points in the trial,  
22 you had Brighton witnesses talking about how the trade  
23 dress also had to do with black or brown leather or  
24 braiding.

25 But at the bottom there are -- there are two



ORAL ARGUMENT - 1/13/2011

Page 15

1 separate issues here. The first on the jury  
2 instruction, your Honor, is none of that collection or  
3 assemblage of elements gave the jury any close  
4 instruction on what exactly the trade dress was that was  
5 claimed, and the elements themselves -- getting back to  
6 the generic point -- are utterly common in this  
7 industry: leather, brocade, braiding, colors, if you  
8 want to throw that in, which didn't appear to be part of  
9 the trade dress except in a couple witness' testimony,  
10 silver --

11 JUDGE McKEOWN, PRESIDING: I wouldn't go with  
12 colors, whether they argued it, but of course we know  
13 that those can be descriptive; they can acquire  
14 secondary meaning.

15 CATHERINE E. STETSON, ESQ.: True. Yes.

16 JUDGE McKEOWN, PRESIDING: So I don't think that  
17 those are unprotectable in the trademark world.

18 I guess my -- my problem, which I will also  
19 discuss with Brighton's counsel, is the suggestion that  
20 in the jury instruction that you can have secondary  
21 meaning on top of a generic mark or a generic trade  
22 dress, which I think -- speaking only for myself not the  
23 panel, but I think that misstates the law both from the  
24 Supreme Court and the Ninth Circuit.

25 The question I have is, "Well, then what?"

ORAL ARGUMENT - 1/13/2011

Page 16

1 because looking at the closing arguments, and even  
2 trying to parse through the testimony, it didn't seem  
3 that it was really argued, "Well, look. This really is  
4 generic, so don't even go there, Jury." And so I'm  
5 wondering if it might be harmless error in the scheme of  
6 things --

7 CATHERINE E. STETSON, ESQ.: Well --

8 JUDGE McKEOWN, PRESIDING: -- even assume -- let's  
9 just assume that the jury instructions legally misstate  
10 --

11 CATHERINE E. STETSON, ESQ.: Sure.

12 JUDGE McKEOWN, PRESIDING: -- and were in error --

13 CATHERINE E. STETSON, ESQ.: And -- and I do agree  
14 with you, Judge McKeown, that -- that when it comes to  
15 the instruction from this Court and the Supreme Court,  
16 it's simply not the case that you can leapfrog over a  
17 generic misdetermination, find secondary meaning and  
18 rescue a generic trade dress.

19 But as for harmless error, you know, the jury  
20 was not instructed on whether or not this trade dress  
21 was generic.

22 And what do you have in the record are  
23 persistent attempts, I would say, by Coldwater's counsel  
24 to establish with each of the witnesses who spoke about  
25 trade dress what exactly the contours of this trade

ORAL ARGUMENT - 1/13/2011

Page 17

1 dress were and how they were limited.

2 And if the jury had been instructed on  
3 "genericness" and the lawyer had been permitted to  
4 argue "genericness" as a -- as a threshold cutoff to any  
5 further discussion of secondary meaning or customer  
6 confusion, I think you would likely have had a very  
7 different outcome.

8 That of course isn't even the standard.

9 Under the two cases that your order cited,  
10 Gambini and Kennedy, both of which dealt with the  
11 harmless error and civil jury instructions, the question  
12 is, if there is any evidence to support the notion, the  
13 jury could have found your way, if you're the aggrieved  
14 party asking for an instruction you didn't get.

15 Now, in Kennedy --

16 JUDGE McKEOWN, PRESIDING: What if -- could -- could  
17 this -- let's assume it's in error and you're just  
18 walking down this path. Could this Court determine that  
19 as a matter of law the trade dress is not generic and  
20 therefore that it's a harmless instruction?

21 CATHERINE E. STETSON, ESQ.: Your Honor, I think the  
22 question of whether something is or is not generic is  
23 something that should be put to the jury.

24 JUDGE McKEOWN, PRESIDING: I mean, usually --

25 CATHERINE E. STETSON, ESQ.: It can be --

ORAL ARGUMENT - 1/13/2011

Page 18

1 JUDGE McKEOWN, PRESIDING: It's usually a question  
2 of --

3 CATHERINE E. STETSON, ESQ.: Right.

4 JUDGE McKEOWN, PRESIDING: -- fact. But you can  
5 still have summary judgment on things that are questions  
6 of fact where there's --

7 CATHERINE E. STETSON, ESQ.: Exactly.

8 JUDGE McKEOWN, PRESIDING: -- where you make a  
9 le- -- like, "Here's all the facts. What's the legal  
10 judgment?"

11 CATHERINE E. STETSON, ESQ.: You're certainly right  
12 that you can even in a fact question have summary  
13 judgment granted.

14 But I would submit that in this case where the  
15 Court went off the rails in the jury instructions, it  
16 would be important to send that issue back for either  
17 the Court, in the first instance, which you will  
18 remember granted summary judgment only in part on the  
19 copyright and trade dress issues here, concluding that  
20 the rest of it needed to be sent to the jury.

21 JUDGE McKEOWN, PRESIDING: Well, let me ask you a  
22 related question.

23 Let's just assume that the damage was upheld  
24 and then it went -- and -- and let's assume it went back  
25 on the generic question or I guess it would be the trade

ORAL ARGUMENT - 1/13/2011

Page 19

1 dress question, and let's say the jury -- and it said,  
2 "You know, you can't have generic trade dress, but if  
3 you show that you're at least descriptive or above" --

4 CATHERINE E. STETSON, ESQ.: Right.

5 JUDGE McKEOWN, PRESIDING: -- "and you get secondary  
6 meaning, you're -- you're in the pink and you can keep  
7 going" and the jury came out in favor of Brighton.

8 Would you need to have another damages trial or  
9 would you -- would you be able -- if there were no error  
10 in the damages stick with the damages?

11 CATHERINE E. STETSON, ESQ.: Assuming -- assuming  
12 the exact path that you set out, which is that the same  
13 trade dress is -- is in play, which of course is a  
14 difficult question to assume because the contours of the  
15 trade dress are ill-defined, and the same therefore  
16 number of products are in play, you probably could not  
17 take away some increment of damages based on that  
18 subsequent verdict from the way that you've laid it  
19 out.

20 But let me on that point get quickly to the  
21 damages issue because I know I'm running out of my  
22 time.

23 The damages issue I think is -- is most plainly  
24 brought forward by Brighton's expert Wunderlich's own  
25 testimony, and you can find it at excerpts of record 274

ORAL ARGUMENT - 1/13/2011

Page 20

1 to about 286, and I want to focus you on two particular  
2 strains of argument that Mr. Wunderlich offers. One of  
3 them has to do what I'll call the "lost sale" theory,  
4 which is for every Coldwater sale Brighton lost a sale.  
5 And you can find that most plainly at record excerpts  
6 276 and 278, Brighton lost 115,000 opportunities to sell  
7 its products.

8 That is the data predicate for what Brighton is  
9 now describing as its "actual damages" theory, which is  
10 what Brighton calls its "lost customer" theory, which is  
11 because Coldwater was selling less expensive bags,  
12 certain Brighton customers walked away from Brighton  
13 never to return again.

14 The problem is that both in his expert  
15 testimony and in counsel's closing argument the basis  
16 for that theory was the Coldwater sales, the 115,000  
17 Coldwater sales that led in turn to this 1.7 multiplier  
18 that we discuss in our brief that led in turn to a  
19 damages award.

20 Now, the problem is, as this Court has pointed  
21 out in the Polar Bear Productions case and the Murphy  
22 Tugboat case before that and several others, it's  
23 certainly the case that you don't need to show lost  
24 profits -- you can't -- with any mathematical  
25 certainty.

ORAL ARGUMENT - 1/13/2011

Page 21

1 But what you do need to show under Polar Bear  
2 Productions is that the calculation was based on  
3 relevant data and supported by substantial evidence.

4 The problem here is that essentially the expert  
5 was supporting one theory with data drawn from another.

6 So just by way of analogy, if you want to find  
7 out, you know, the total amount of tuition paid to USC,  
8 you don't start by asking how many students there are at  
9 UCLA. That's in essence the problem.

10 JUDGE FLETCHER: Could you narrow the analogy by  
11 telling me precisely what his mistake was? Because I'm  
12 not sure I understand it yet.

13 CATHERINE E. STETSON, ESQ.: Sure.

14 His mistake was in importing the Coldwater  
15 sales, the 115,000 Coldwater sales as a predicate for --

16 JUDGE FLETCHER: What do you mean --

17 CATHERINE E. STETSON, ESQ.: -- Brighton's --

18 JUDGE FLETCHER: What do you mean by "predicate"?

19 CATHERINE E. STETSON, ESQ.: If you look at Page 276  
20 to 278 where he gets into his theory exactly, what he  
21 describes is that he's taking this number as what he  
22 calls "a convenient assumption" --

23 JUDGE FLETCHER: Yeah.

24 CATHERINE E. STETSON, ESQ.: -- a 1-to-1  
25 correspondence between Coldwater sales and Brighton's.

ORAL ARGUMENT - 1/13/2011

Page 22

1 But then he starts playing with that number a little  
2 bit. He says, "Well, on the other side of my theory,  
3 the 'lost Brighton customer' theory, if you take this  
4 number and you divide it by" -- he says -- "6 or 7, you  
5 get 20,000 Brighton customers."

6 And that certainly seems like a good estimate  
7 for customers who would have walked away from  
8 Brighton.

9 JUDGE FLETCHER: Let me -- let me cut to the chase,  
10 if I may.

11 As I read your brief, you were saying this  
12 1-to-1 theory didn't make any sense because the price of  
13 the Brighton product was so much more than the price of  
14 the Coldwater product, and to assume that if someone  
15 buys a Coldwater product purse that that same person  
16 would have bought a Coldwater purse is ridiculous, which  
17 I think is quite right.

18 But that wasn't his theory. His theory was,  
19 "This is a knock-off. People buy Brighton products in  
20 part because it's special. And if they see people  
21 walking around with purses that are very similar and  
22 easily confused that can be bought very cheaply, the fun  
23 or pleasure of having bought an expensive product  
24 disappears and so the sales fall off."

25 So those are two very different theories.



ORAL ARGUMENT - 1/13/2011

Page 23

1 CATHERINE E. STETSON, ESQ.: They are. But that's  
2 the problem with Dr. Wunderlich's data is that in order  
3 to support your -- your theory, you're exactly right,  
4 the "lost customer" theory --

5 JUDGE FLETCHER: I don't -- I don't have -- I don't  
6 have a theory.

7 CATHERINE E. STETSON, ESQ.: Well, the theory you're  
8 describing, I should say, the "lost customer" theory.

9 JUDGE FLETCHER: Right.

10 CATHERINE E. STETSON, ESQ.: What Wunderlich did was  
11 to take the Coldwater sales as a predicate for his "lost  
12 customer" theory.

13 Now, there's other ways to do that.

14 If you look at a lot of the damages cases, the  
15 lost profits cases that are cited in Brighton's own  
16 brief, you will find, you know, in essence a recipe for  
17 how to establish lost profits. You look at market  
18 data. You look at comparable products. You look at --  
19 depending on the sort of case you're talking about, you  
20 look at other types of forecasts. You look at consumer  
21 purchasing data.

22 The problem was that if you examined  
23 Wunderlich's testimony, he was borrowing data from that  
24 "lost sales" theory, the -- the, you know, for every  
25 lost Coldwat- -- for every Coldwater sale Brighton lost

ORAL ARGUMENT - 1/13/2011

Page 24

1 a sale, which (unintelligible) his claim, and he's using  
2 that as the starting point --

3 JUDGE FLETCHER: But --

4 CATHERINE E. STETSON, ESQ.: -- for his "lost  
5 profits" theory.

6 JUDGE FLETCHER: But I don't read his testimony as  
7 saying, "The lost sales are because of the sale of the  
8 Coldwater product" in the sense that that this customer  
9 would have bought Brighton if that customer had had  
10 available side by side a Brighton and a Coldwater.  
11 I just don't think he's saying that.

12 CATHERINE E. STETSON, ESQ.: No. I don't think --

13 JUDGE FLETCHER: The question -- the question is,  
14 does he have enough basis for figuring that this is the  
15 number that -- of lost sales by Brighton based upon, as  
16 it were, the diminution of the brand value?

17 CATHERINE E. STETSON, ESQ.: And that is exactly the  
18 question, your Honor.

19 And what we're saying -- what we argue in our  
20 brief and I'm suggesting to you here is that if you --  
21 if you take as the starting point from -- from the old  
22 Supreme Court Bigelow case, from this Court's Polar Bear  
23 Productions case that you need relevant data to support  
24 a lost profits issue, you can't draw that data from  
25 another theory and start massaging it and importing it

ORAL ARGUMENT - 1/13/2011

Page 25

1 into your theory.

2 There were other ways that --

3 JUDGE McKEOWN, PRESIDING: That is the question.

4 Your bottom line is that you think that the  
5 data he's using is the wrong base --

6 CATHERINE E. STETSON, ESQ.: Yes.

7 JUDGE McKEOWN, PRESIDING: -- for the theory that he  
8 adopted?

9 CATHERINE E. STETSON, ESQ.: Yes. I mean, it goes  
10 back to my, you know, relatively simple but I think  
11 apropos UCLA/USC analogy.

12 If you're out to calculate a cer- -- monetize a  
13 certain element of UCLA's tuition, you don't start with  
14 USC's undergraduate student base.

15 So too here.

16 If you're out to monetize a -- or -- or even  
17 approach a reasonable estimate, which is all this  
18 Court's precedence demand, of Brighton's lost profits.  
19 You don't start by estimating Coldwater sales.

20 You estimate exactly what, your Honor, Judge  
21 Fletcher was talking about. You ask yourself, "Based on  
22 market data, based on statistics of Brighton's sales of  
23 these products, based on comparable industries" -- and  
24 these are all ideas that I'm pulling from lost profits  
25 cases of the past -- "what can I demonstrate, I,

ORAL ARGUMENT - 1/13/2011

Page 26

1 Brighton's expert, about the diminution in sales at  
2 Brighton because of Coldwater's -- because of  
3 Coldwater's infringement on trade dress?"

4 JUDGE McKEOWN, PRESIDING: All right. I think we'll  
5 hear from Mr. Ross now.

6 CATHERINE E. STETSON, ESQ.: Very good. Thank you.

7 JUDGE McKEOWN, PRESIDING: You've ended your time.

8 (Pause in proceeding.)

9 PETER ROSS, ESQ.: Good morning, your Honors. Peter  
10 Ross for the Respondent Brighton.

11 I'm going to start out with the genericness  
12 issue.

13 The Wal-Mart -- in the Wal-Mart case, the U.S.  
14 Supreme Court discussed the requirements for proving  
15 that product design trade dress is protectable, and the  
16 Court concluded that the plaintiff in such case must  
17 prove secondary meaning. The U.S. Supreme Court didn't  
18 discuss "genericness" as an additional requirement.

19 JUDGE McKEOWN, PRESIDING: No. What the -- what I  
20 think the Wal-Mart case and the others say is you  
21 don't -- with product design, you no longer can get  
22 yourself in that upper category of trademark  
23 hierarchy --

24 PETER ROSS, ESQ.: Yes.

25 JUDGE McKEOWN, PRESIDING: -- but instead you must

ORAL ARGUMENT - 1/13/2011

Page 27

1 prove secondary meaning. But they did nothing to take  
2 away what at least I have understood for many years to  
3 be the bottom line, which is you can't have a trademark  
4 on something that's generic.

5 So I don't know if that our difference in view  
6 comes in a difference in reading Wal-Mart or you have  
7 another case that says you can put secondary meaning on  
8 top of a generic mark or a trade dress and still get a  
9 protectable item.

10 PETER ROSS, ESQ.: I understand what your Honor is  
11 saying, and this is my response.

12 I think that given what the U.S. Supreme Court  
13 said in Wal-Mart and thinking logically about what  
14 "genericness" is, there's no need for an extra  
15 requirement of genericness. It would be superfluous.

16 A generic product is by definition one that's  
17 incapable of acquiring secondary meaning.

18 A plain baseball bat with no markings on it at  
19 all, whose bat is it?

20 A white shirt like the one I'm wearing with a  
21 collar and a single pocket on the breast and cuffs and  
22 buttons, whose shirt is it?

23 A leather handbag without a single  
24 embellishment on it, who made it?

25 No one would know. It's generic and it can't

ORAL ARGUMENT - 1/13/2011

Page 28

1 possibly acquire a secondary meaning. We don't really  
2 need --

3 JUDGE McKEOWN, PRESIDING: But here's -- see, now  
4 you're saying what I think I'm saying, but that's  
5 different what you started with.

6 Here's the jury instruction that bothers me:  
7 "A generic mark without secondary meaning  
8 does not receive trademark protection."

9 So what that says to me is, if you can get  
10 secondary meaning, even if you have a generic mark, then  
11 you get trademark protection.

12 So that specific statement that found its way  
13 into the jury instructions is a fairly critical  
14 situation. I know there was some discussion about it.  
15 You see that in the record.

16 But why isn't that a legal error?

17 PETER ROSS, ESQ.: I understand the Court's point on  
18 that. That -- that statement itself is confusing.

19 The rest of the -- the rest of the instruction  
20 goes on to accurately describe "genericness," and I  
21 think that no jury would be capable of finding secondary  
22 meaning were they faced with a generic product or  
23 generic trade dress.

24 JUDGE McKEOWN, PRESIDING: Well, the problem is it  
25 says -- it tells them they can do that. It says, you

ORAL ARGUMENT - 1/13/2011

Page 29

1 know, "You need secondary meaning if you have generic  
2 mark," and then it tells you what generic design is and  
3 then it tells that if you have trade dress in your  
4 design, you need secondary meaning," so basically tells  
5 them, you know, "Now you go to the secondary meaning  
6 instructions and see if they pan out."

7 PETER ROSS, ESQ.: I think as a matter of logic, the  
8 jury simply could not have found secondary meaning if it  
9 really found there was a generic trade dress.

10 But let me talk about harmless error.

11 The lessons of the Gambini and Kennedy cases  
12 seem to be that the failure to give an instruction or an  
13 instruction given is harmless error where no real  
14 reasonable jury could have found for the other side had  
15 the instruction properly been given.

16 Here I don't think any reasonable jury could  
17 have found for Coldwater, even had a different  
18 instruction on "genericness" been given.

19 Brighton's trade dress bags are clearly not  
20 generic. We can look at them and see. They're highly  
21 embellished. They have a distinctive brocaded fabric on  
22 them. They have embossed letter trim. They have  
23 sculpted silver hearts and braided handles. Just not a  
24 generic item as a matter of law.

25 To answer --

ORAL ARGUMENT - 1/13/2011

Page 30

1 JUDGE McKEOWN, PRESIDING: How did this -- how did  
2 this get in there?

3 PETER ROSS, ESQ.: Well --

4 JUDGE McKEOWN, PRESIDING: I mean, I tried to figure  
5 that out.

6 PETER ROSS, ESQ.: I think that that instruction got  
7 in there because Coldwater was requesting that the Court  
8 say something about "genericness," and the Court was  
9 having a hard time reconciling that request with the  
10 Wal-Mart case in the absence of any generic requirement,  
11 so the Court crafted an instruction. And while it was  
12 being crafted, Coldwater actually never spoke up and  
13 said anything about it one way or another.

14 JUDGE FLETCHER: So the actual drafting of inserting  
15 "generic mark" into Instruction 19 was done by the  
16 judge?

17 PETER ROSS, ESQ.: By the judge in open court.

18 JUDGE FLETCHER: And there was no objection by  
19 Coldwater?

20 PETER ROSS, ESQ.: That's -- that's my  
21 recollection. I believe that's what we say in our  
22 papers.

23 JUDGE FLETCHER: Yeah. Well, I guess --

24 JUDGE McKEOWN, PRESIDING: There could be a problem.

25 JUDGE FLETCHER: -- if your recollection is wrong --



ORAL ARGUMENT - 1/13/2011

Page 31

1 JUDGE McKEOWN, PRESIDING: Yeah.

2 JUDGE FLETCHER: -- we'll hear about it.

3 JUDGE McKEOWN, PRESIDING: I guess when I read that,  
4 I thought that they were asking for a statement, "We  
5 want to have the jury -- make sure that it's not  
6 generic."

7 And then my problem here, as I read, Judge Huff  
8 was, you know, a very capable judge. It somehow seemed  
9 to get crosswise with the Wal-Mart case in some way and  
10 then came up with this. And I was trying to go through  
11 the transcript trying to figure out how this was really  
12 happening in the -- in the jury instruction conference.

13 So it just seemed like this -- what Coldwater  
14 asked for were generic -- what they asserted, the  
15 offense of genericness, and they said that you should  
16 have the burden of showing that your trade dress is  
17 non-generic, so they wanted an instruction to that  
18 effect, sort of a baseline instruction before you get to  
19 secondary meaning.

20 But the Court didn't give that, so they -- I  
21 mean, they -- I guess the Court sent all the  
22 instructions they asked for that were assumed to be  
23 objections. Right? Is that how -- I mean, that's how I  
24 read the transcript.

25 PETER ROSS, ESQ.: Yes.

ORAL ARGUMENT - 1/13/2011

Page 32

1 JUDGE McKEOWN, PRESIDING: You didn't have to object  
2 to get everything you asked for that didn't get given as  
3 an objection?

4 PETER ROSS, ESQ.: Yeah. So the way it worked is  
5 this, my understanding.

6 They were requesting the genericness  
7 instruction. Judge Huff, who is a very careful and good  
8 Judge, was sitting there in open court and started to  
9 draft this thing. There was colloquy between Brighton's  
10 counsel and the judge, Coldwater's counsel doesn't  
11 object, and this instruction is settled upon and given.

12 And we describe that in our Respondent's brief,  
13 and in their reply, Coldwater says, "Yes, but we  
14 objected because we proposed other genericness  
15 instructions that were not given."

16 So, as I would analyze that, their objections  
17 were to not giving the other instructions, but no  
18 objection was raised to this instruction, which was  
19 crafted --

20 JUDGE McKEOWN, PRESIDING: What about --

21 PETER ROSS, ESQ.: -- in court.

22 JUDGE McKEOWN, PRESIDING: One of the questions --  
23 you know, usually "genericness" is a factual issue. So  
24 if this instruction is wrong, just assume for talking  
25 purposes that this instruction is a legal error, and

ORAL ARGUMENT - 1/13/2011

Page 33

1 normally "genericness" is a factual issue, why wouldn't  
2 the jury have to go back and determine that?

3 PETER ROSS, ESQ.: Because of what I was saying just  
4 a moment ago, which is that I think we can all look at  
5 it and say, "This is a highly embellished bag and it's  
6 certainly not generic," whatever else one may think of  
7 it. It's very distinctive. And it's just I -- in  
8 comparison to my white shirt, in comparison to a  
9 baseball bat with nothing on it, in comparison to a  
10 plain leather bag with two leather handles --

11 JUDGE FLETCHER: Well --

12 PETER ROSS, ESQ.: -- that would be generic.

13 JUDGE McKEOWN, PRESIDING: Where would you place --  
14 in your view, where in the trademark hierarchy do you  
15 place the Brighton compilation?

16 PETER ROSS, ESQ.: Oh. Well, given Wal-Mart, we  
17 really don't have much of a hierarchy, but --

18 JUDGE McKEOWN, PRESIDING: So it would be  
19 descriptive at best?

20 PETER ROSS, ESQ.: I think that's -- well, that  
21 doesn't even --

22 JUDGE McKEOWN, PRESIDING: I know you don't want it  
23 to be generic/generic.

24 PETER ROSS, ESQ.: No. It doesn't even apply  
25 really, descriptive. I mean, if we were using that

ORAL ARGUMENT - 1/13/2011

Page 34

1 real -- that -- that hierarchy, it is inherently  
2 distinctive. That's how people recognize it.

3 The -- Coldwater itself was asking its  
4 designers to come up --

5 JUDGE McKEOWN, PRESIDING: Now you're -- now you're  
6 merging that with secondary meaning, aren't you?

7 PETER ROSS, ESQ.: Well, no.

8 Coldwater itself was asking its designers to  
9 come up with a bag with a "Brightony" look.

10 People -- there was testimony from Monica  
11 Bolin, who is the retail store owner in Michigan and she  
12 was selling a knock-off line and people came in everyday  
13 and said, "Is that -- isn't that Brighton? Are you  
14 selling Brighton?"

15 There was testimony that people saw their ads  
16 and thought, "Why is Brighton selling their bags now in  
17 Coldwater Creek's catalogs?"

18 All these things show that -- that the trade  
19 dress is distinctive, that it really is something people  
20 can look at and say, "Hey, that's a Brighton bag."

21 To give another analogy, the plain leather bag  
22 with nothing on it, two leather handles, that's generic,  
23 but you just add some crosshatching quilt pattern and a  
24 metal link handle on it, and people are going to  
25 recognize that as a Chanel bag. I've now created a

ORAL ARGUMENT - 1/13/2011

Page 35

1 Chanel bag. It's clearly not generic any more just by  
2 adding the quilting and a metallic chain link handle.  
3 It's embellished. People can recognize it.

4 In their own market, Brighton sells 300, \$400  
5 million a year of product. And people love it. They  
6 collect it. On average the testimony was, a Brighton  
7 customer owns about 10 to 12 Brighton accessories.

8 JUDGE McKEOWN, PRESIDING: And they buy, what, 1.7  
9 things when they come in or --

10 PETER ROSS, ESQ.: They come into the store, data  
11 shows that they buy 1.7 things every time they make a  
12 transaction.

13 So it's distinctive. And I don't think there's  
14 any question about that. And I think the summary  
15 judgment analogy is a good one. We can all look at  
16 these bags and say, whatever they are, they might not be  
17 your taste, but they're certainly not generic.

18 JUDGE FLETCHER: Yeah. I mean, I have to say, I'm  
19 not an expert in bags or purses, but it's hard for me  
20 actually to see any bag that's actually on the market as  
21 generic. Having a very simple bag with no embellishment  
22 is in fact a design choice, and it would out -- it would  
23 stand out in the market as well. I mean, I have trouble  
24 understanding that it's very likely that any bag being  
25 sold would in fact be generic.

ORAL ARGUMENT - 1/13/2011

Page 36

1 PETER ROSS, ESQ.: That -- that could well be the  
2 case.

3 It's funny that I am a handbag expert at this  
4 point in my life.

5 (Laughter.)

6 JUDGE McKEOWN, PRESIDING: I bet.

7 PETER ROSS, ESQ.: But I --

8 JUDGE McKEOWN, PRESIDING: (Unintelligible) --

9 PETER ROSS, ESQ.: But there was -- there was --

10 JUDGE McKEOWN, PRESIDING: -- a Brighton handbag.

11 PETER ROSS, ESQ.: There was one other question that  
12 Judge Fletcher asked I believe earlier, which is if the  
13 case is remanded for a determination as to whether the  
14 bags are generic --

15 JUDGE FLETCHER: That was McKeown.

16 JUDGE McKEOWN, PRESIDING: Yeah.

17 JUDGE FLETCHER: Yeah.

18 PETER ROSS, ESQ.: Oh, okay.

19 JUDGE FLETCHER: Generic judgment.

20 JUDGE McKEOWN, PRESIDING: But we do look alike.

21 JUDGE FLETCHER: Yeah. Right.

22 PETER ROSS, ESQ.: I'm sorry.

23 JUDGE McKEOWN, PRESIDING: We wear the same -- we do  
24 have a generic dress, I would say.

25 PETER ROSS, ESQ.: Would there be any reason to

ORAL ARGUMENT - 1/13/2011

Page 37

1 retry the damages?

2 And I don't think there would be any reason.

3 If the jury decides this bag or these bags are generic,  
4 which I find impossible to believe, then no damages  
5 exist and the case is wiped out on trade dress.

6 And if the jury determines that the bags are  
7 not generic, which would have to be the result, the  
8 damages have already been determined from these very  
9 bags, and we don't have to retry that case either.

10 Oh.

11 JUDGE McKEOWN, PRESIDING: Do you want talk about  
12 the damages?

13 PETER ROSS, ESQ.: Okay.

14 In my view the damages depend on whether we  
15 really believe in the Story Parchment case. It's a 1931  
16 Supreme Court case, but it's never been questioned or  
17 overturned. And basically it says that the fact of  
18 damage must be proven with reasonable certainty, and if  
19 the fact of damage is proven, then the amount can be  
20 left to the reasonable estimation of the jury. And the  
21 U.S. Supreme Court notes --

22 JUDGE FLETCHER: Yeah. But that's just gets us  
23 started. Okay. So --

24 PETER ROSS, ESQ.: Yeah.

25 JUDGE FLETCHER: -- what's a reasonable estimation

ORAL ARGUMENT - 1/13/2011

Page 38

1 and what's a reasonable basis for the Brighton expert to  
2 have informed the jury as to what his estimate was?

3 PETER ROSS, ESQ.: Okay.

4 JUDGE FLETCHER: And -- and I do -- and I am  
5 somewhat sympathetic to the argument from the other  
6 side, that it's hard to figure out the damage to the  
7 brand as a kind of 1-to-1, for every bag sold by  
8 Coldwater that is a violation, that cost from the sale  
9 of one bag of their own. I mean, that's -- that might  
10 be right, but it might be right only because it's a  
11 coincidence.

12 PETER ROSS, ESQ.: Okay. Let me address that.

13 But before I do, I'm just going to say one more  
14 sentence about Story Parchment, which is that the Court  
15 stated that its holding was particularly applicable in  
16 antitrust, copyright and trademark where damages are  
17 hard to pin down.

18 JUDGE FLETCHER: Sure.

19 PETER ROSS, ESQ.: So here we have the fact of  
20 damages.

21 Their expert admits that our expert says that  
22 their expert Ellen Goldstein-Lynch said that where you  
23 have the sale of cheap knock-offs, those harm sales of  
24 the authentic brand. So essentially if we have cheap  
25 knock-offs being sold. The experts on both sides agree



ORAL ARGUMENT - 1/13/2011

Page 39

1       there is the --

2           JUDGE FLETCHER:   Sure.

3           PETER ROSS, ESQ.:  -- fact of damage.

4           JUDGE FLETCHER:   Sure, sure.

5           PETER ROSS, ESQ.:  So what did the jury have to go  
6       on to reasonably estimate the amount of damages?

7                   They were given, among other things, the  
8       following evidence: that these knock-offs appeared in  
9       120 million catalogs distributed throughout the  
10      United States and in hundreds of retail stores across  
11      the country; that by Coldwater's estimate over 50  
12      million Americans saw these knock-offs.  That's one out  
13      of every five adults in this country.

14           JUDGE FLETCHER:  Saw these knock-offs either in the  
15      flesh, as it were, or in the catalog?

16           PETER ROSS, ESQ.:  Yeah.

17           JUDGE FLETCHER:  Did not necessarily see the real  
18      item?

19           PETER ROSS, ESQ.:  That's right.  You know, but a  
20      huge number of people saw these knock-offs.  This is a  
21      big, powerful company, and they were out there using  
22      their entire marketing power to show these knock-offs to  
23      the country, and they did a good job of it.

24                   Brighton has over 2 million customers, and on  
25      average they buy 10 to 12 Brighton accessories apiece,

ORAL ARGUMENT - 1/13/2011

Page 40

1 unless something happens to turn them off.

2 So given all that, the jury found that 13,000  
3 Brighton customers would be affected by this. That's  
4 less than 1 percent of the Brighton customers.

5 And by the way, it's significant --

6 JUDGE CLIFTON: But was so affected they would never  
7 buy from Brighton again?

8 PETER ROSS, ESQ.: Yes.

9 JUDGE CLIFTON: I got to say, it strikes me as a  
10 house of cards. I just don't understand where the  
11 numbers come from.

12 There's no connection between the number of  
13 viewings you've identified and the results that are  
14 purportedly estimated because of it.

15 PETER ROSS, ESQ.: Well, the jury in my view was  
16 entitled to take these facts and --

17 JUDGE CLIFTON: Well, they didn't take facts. They  
18 took testimony from an expert who acknowledged it was a  
19 convenient assumption but pushed a lot of numbers  
20 forward that I simply can't find a logical foundation  
21 for. I mean, I understand the relationship, but even  
22 that's not clear. The fact that something is ubiquitous  
23 doesn't mean that it's not popular. Indeed, "ubiquity"  
24 means there's a lot of popularity --

25 PETER ROSS, ESQ.: Well --

ORAL ARGUMENT - 1/13/2011

Page 41

1 JUDGE CLIFTON: And the fact that things are seen  
2 doesn't mean they're seen as knock-offs. It may seem  
3 that "Oh, this is the bag that we're supposed to go out  
4 and buy." So --

5 PETER ROSS, ESQ.: Yeah.

6 JUDGE CLIFTON: -- I'm just kind of adrift. I  
7 understand that the fact of damages is -- is -- is the  
8 critical determination, and I'll accept that you've got  
9 that here, but I have a real problem coming up with a  
10 number based on what was offered up.

11 PETER ROSS, ESQ.: Well, what your Honor is  
12 suggesting is exactly contrary to what the experts on  
13 both sides concluded, which is that if you have cheap  
14 knock-offs out there --

15 JUDGE CLIFTON: But you haven't told us that.  
16 You've told us that people have seen things. That's not  
17 the same thing necessarily as having cheap knock-offs  
18 out there.

19 I mean, I accept the proposition there are  
20 cheap knock-offs out there because there are counterfeit  
21 Louie Vuitton bags; Louie Vuitton likely suffers in some  
22 fashion. That's fine. But the damage award is a  
23 precise figure, and I just can't figure out what it's  
24 based on.

25 PETER ROSS, ESQ.: Well, the fact that the cheap

ORAL ARGUMENT - 1/13/2011

Page 42

1 knock-offs are out there and they are -- these bags were  
2 selling for about one-fifth the price of the Brighton  
3 bags, the effect, and this is described by the experts,  
4 is that women no longer believe that the Brighton bags  
5 have any cachet. That -- that's the effect that was  
6 described and that was in evidence.

7 JUDGE McKEOWN, PRESIDING: The difficulty I have,  
8 and maybe you can help me, is I feel like I have this  
9 constellation of unconnected numbers or facts, and  
10 normally in a damage theory you construct a theory that  
11 kind of runs from one presumption through.

12 And as Judge Fletcher said, there's so much  
13 mixing and matching here, so I feel like, "Well, yeah,  
14 there's definitely damage if it's -- if it's a  
15 knock-off. Lots of people saw it. Do have damage. You  
16 have this many customers. We sold this many things."  
17 It's like all this is floating around and --

18 PETER ROSS, ESQ.: Uh-huh.

19 JUDGE McKEOWN, PRESIDING: -- there's not a coherent  
20 damages theory. And that's where once you have a fact  
21 of damages, our cases suggest, you know, it can't be  
22 speculative, and that's where we're struggling with is  
23 how to move what can't be totally precise from being  
24 speculative.

25 JUDGE CLIFTON: Yeah.

ORAL ARGUMENT - 1/13/2011

Page 43

1 PETER ROSS, ESQ.: Right.

2 JUDGE McKEOWN, PRESIDING: And that's kind of a  
3 little bit of a needling feeling I have, and I don't  
4 know yet. I mean, it's -- it's a complicated thing, as  
5 you've explained, and there's definitely damage.

6 How do you connect up these almost related  
7 facts?

8 PETER ROSS, ESQ.: Well, I think -- you know, I  
9 think that's where one has to give Story Parchment its  
10 due saying that an antitrust, copyright and trademark  
11 where the fact is proven, and these are the words of the  
12 Supreme Court, the defendant assumes the risk that some  
13 estimation has to be made --

14 JUDGE McKEOWN, PRESIDING: Right.

15 PETER ROSS, ESQ.: -- of what the amount of damage  
16 is and --

17 JUDGE McKEOWN, PRESIDING: But the estimates can't  
18 be -- at some point they cross to speculation.  
19 Correct?

20 PETER ROSS, ESQ.: Yes.

21 JUDGE McKEOWN, PRESIDING: I mean, in other words,  
22 what that case is saying, if you've got damage, you  
23 don't need absolute precision to get a damages number.

24 PETER ROSS, ESQ.: Uh-huh.

25 JUDGE McKEOWN, PRESIDING: But that intersects with

ORAL ARGUMENT - 1/13/2011

Page 44

1 all our other cases, which also say you can't speculate.

2 JUDGE FLETCHER: Do we have evidence in the record,  
3 for example, that shows sales of other Brighton products  
4 going up and the sale of the Brighton handbag at issue  
5 going down after the appearance of the Coldwater  
6 handbag?

7 PETER ROSS, ESQ.: Yes.

8 JUDGE FLETCHER: And what do those -- what do those  
9 numbers tell us?

10 PETER ROSS, ESQ.: I don't have those numbers in  
11 mind but they're in the record, and that's exactly what  
12 happened.

13 And I would point out --

14 JUDGE McKEOWN, PRESIDING: But would that be -- but  
15 that's not the basis for the damages theory, is it?

16 PETER ROSS, ESQ.: No. It's just another basis for  
17 saying --

18 JUDGE McKEOWN, PRESIDING: It seems like that would  
19 be a good basis.

20 JUDGE FLETCHER: No. But it seems to me that's  
21 exactly the basis for the theory. The theory is that as  
22 soon as these Coldwater bags come on the market, that  
23 diminishes the appeal of the Brighton bags, and that  
24 then costs sales. That's the theory.

25 PETER ROSS, ESQ.: Yeah.

ORAL ARGUMENT - 1/13/2011

Page 45

1 JUDGE FLETCHER: That's always the theory.

2 PETER ROSS, ESQ.: Yeah.

3 JUDGE FLETCHER: And the question then is, what data  
4 do we have to back it up?

5 And it sounds as though if we have other  
6 Brighton products continuing to go up and this  
7 particular Brighton product maybe one of not very many  
8 Brighton products beginning to have trouble more or less  
9 coinciding with the appearance of all these Coldwater  
10 bags, that's helpful.

11 PETER ROSS, ESQ.: Yeah.

12 JUDGE FLETCHER: And you say there are numbers in  
13 the record but you just don't know what they are.

14 PETER ROSS, ESQ.: I don't know what they are.

15 JUDGE McKEOWN, PRESIDING: But I guess what I'm  
16 saying, just to understand, is I think that that --  
17 Judge Fletcher has laid out what would be a logical  
18 damages theory.

19 My question is, were those numbers, the  
20 following sales numbers or the delta between what used  
21 to be, was that part of your damages?

22 PETER ROSS, ESQ.: That wasn't part of the  
23 calculation made.

24 JUDGE McKEOWN, PRESIDING: It wasn't part of the  
25 calculation. Okay.

ORAL ARGUMENT - 1/13/2011

Page 46

1 PETER ROSS, ESQ.: Now --

2 JUDGE McKEOWN, PRESIDING: So there's numbers, but  
3 they didn't kind of find their way into the big  
4 arithmetic. Right?

5 PETER ROSS, ESQ.: Yeah. Let -- let me just make a  
6 coup- --

7 Yes. That's right.

8 JUDGE McKEOWN, PRESIDING: Okay.

9 PETER ROSS, ESQ.: -- a couple of quick points on  
10 this.

11 The jury did not agree with Mr. Wunderlich's  
12 numbers. The jury found something less than  
13 Mr. Wunderlich proposed.

14 JUDGE CLIFTON: But you've justify that by saying  
15 it's the range he offered up, so it's okay.

16 PETER ROSS, ESQ.: Yes.

17 JUDGE CLIFTON: And if the range he offered up has  
18 no foundation in reality or we find to be purely  
19 speculative, the fact that they found a number that's  
20 within the range doesn't tell us anything; it doesn't  
21 give any confidence in the number the jury came up with.

22 PETER ROSS, ESQ.: That is a reasonable point.

23 But the number that Dr. Wunderlich came up with  
24 and the number the jury came up with is a very small  
25 number, making an assumption that some number of people



ORAL ARGUMENT - 1/13/2011

Page 47

1 are affected, and the experts on both sides agree that  
2 some --

3 JUDGE CLIFTON: And they're so affected they'll  
4 never buy another Brighton product.

5 That assumption I have additional difficulty  
6 with.

7 I mean, my mother was a big shopper from these  
8 kinds of products, and some products she liked and some  
9 products she didn't.

10 The notion that there's a bag that's similar to  
11 a Brighton bag causes her to never buy another Brighton  
12 again is just one that isn't in my radar screen, so --

13 PETER ROSS, ESQ.: Well, let me -- let me move a  
14 little bit away from that -- that exact analogy.

15 There could be some people who never bought  
16 again and there could be other people who stopped buying  
17 for the next five years because they feel put off and  
18 there could be other people who don't buy for the next  
19 year because they feel put off. And we're just trying  
20 to come up with an estimate of how many people there  
21 would be and --

22 JUDGE McKEOWN, PRESIDING: Well, but, you know,  
23 usually when you do that, the expert actually has some  
24 expertise in counterfeiting, and there are studies that  
25 show affects of counterfeiting on consumer behavior. So

ORAL ARGUMENT - 1/13/2011

Page 48

1 when do you that, you take some percentage, you take the  
2 numbers, you apply it.

3 I'm still having this trouble where we have all  
4 these -- you have like some great facts, but I'm not  
5 sure how they get glued together it.

6 PETER ROSS, ESQ.: Yeah.

7 JUDGE McKEOWN, PRESIDING: And so what -- what was  
8 the purpose here, the -- you have a -- in the actual  
9 damages, you also have the alternative of Coldwater's  
10 profits?

11 PETER ROSS, ESQ.: In copyright one can recover the  
12 profits and the actual damages.

13 PETER ROSS, ESQ.: Right.

14 And then you have this -- the -- you have that  
15 on the trade dress as well.

16 PETER ROSS, ESQ.: And in the trade dress, the jury  
17 found numbers for the profits and actual damages --

18 JUDGE McKEOWN, PRESIDING: Correct.

19 PETER ROSS, ESQ.: -- but we were awarded as part of  
20 the judgment just the actual damages.

21 JUDGE McKEOWN, PRESIDING: Just the actual damages,  
22 right, so --

23 JUDGE FLETCHER: You chose the damages.

24 JUDGE McKEOWN, PRESIDING: Because obviously it's a  
25 much bigger number.

ORAL ARGUMENT - 1/13/2011

Page 49

1 PETER ROSS, ESQ.: Yes.

2 JUDGE McKEOWN, PRESIDING: Right.

3 PETER ROSS, ESQ.: Yeah.

4 JUDGE McKEOWN, PRESIDING: So I guess the purpose of  
5 that is if they found no actual damages but they found  
6 some significant profits, you could have taken the  
7 profits.

8 PETER ROSS, ESQ.: That's right.

9 JUDGE McKEOWN, PRESIDING: Okay.

10 PETER ROSS, ESQ.: Yeah.

11 So on -- on the damages, I think it was enough  
12 for the jury that they were given that they could use to  
13 make an estimate that was reasonable.

14 I think I'm --

15 JUDGE McKEOWN, PRESIDING: You are.

16 PETER ROSS, ESQ.: -- out of time.

17 JUDGE McKEOWN, PRESIDING: Thank you. I appreciate  
18 your argument.

19 Ms. Stetson, we'll give you a few minutes for  
20 rebuttal.

21 PETER ROSS, ESQ.: Thank you, your Honor.

22 JUDGE McKEOWN, PRESIDING: Thank you.

23 CATHERINE E. STETSON, ESQ.: Thank you, your  
24 Honors. A couple quick points.

25 To your questions just now about the -- what

ORAL ARGUMENT - 1/13/2011

Page 50

1     you've described, Judge McKeown, as "the constellation  
2     of data out there," I think it's -- it's correct that  
3     there is some data in the record supporting the idea  
4     that there may have been a basis for a legitimate and  
5     substantiated lost customer field.

6             The problem is the theory at record excerpts  
7     274 to 286 that Wunderlich put in front of the jury and  
8     the theory at record excerpts -- supplemental record  
9     excerpts 1771 that counsel for Brighton reiterated to  
10    the jury in his closing argument is that the loss of  
11    115,000 transactions under these circumstances seems  
12    conservative.

13            But, Judge Clifton, as you pointed out, the  
14    fact that, you know, the number of hypothetical lost  
15    transactions seems small in comparison to other Brighton  
16    transactions is irrelevant if it's not based on some  
17    relevant data to the inquiry; if you're starting with a  
18    wrong number, the fact that you're ending up with a  
19    number that looks reasonable is meaningless.

20            So on the damages point, I would essentially  
21    see counsel's Story Parchment and raise him Polar Bear,  
22    Murphy Tugboat, Parlor Enterprises, which is the case  
23    where Wunderlich's theories were knocked back by the  
24    Court of Appeals and a jury verdict overturned.

25            Quickly on generic, if you look at Page 147 of

ORAL ARGUMENT - 1/13/2011

Page 51

1 our record excerpts, you will find, Judge McKeown, as  
2 you pointed out, our argument that the Court had omitted  
3 an important instruction, and it was the instruction  
4 that the plaintiff in a trade dress infringement case  
5 bears the burden of showing non-genericness.

6 Now, to the question about whether in the  
7 hypothetical event the jury had been presented with that  
8 instruction and had been asked that predicate question,  
9 "Has the plaintiff proven non-genericness?" whether the  
10 jury could have found these items generic, I would point  
11 you to what I think is an instructive quote from the  
12 Yurman Designs case, which is a relatively recent case  
13 out of the Second Circuit:

14 "Without a specification of the design  
15 futures that compose the trade dress, different  
16 jurors given the same line of products may  
17 conceive the dress in terms of different elements  
18 and features so that the verdict may be based on  
19 inconsistent findings."

20 Where you have, as in this case, a recitation  
21 throughout the trial of a number of different  
22 combinations and permutations of trade dress, and you  
23 just heard another one today from Brighton's counsel,  
24 braiding -- braiding was not part of the trade dress  
25 that was claimed in the interrogatory responses -- it's

ORAL ARGUMENT - 1/13/2011

Page 52

1 going to have to be put to the jury whether that trade  
2 dress in combination or in multiple combinations was so  
3 broad and so overinclusive that it essentially  
4 threatened, as Yurman described it, to 'fence off' a  
5 part of the product market that is incredibly common in  
6 handbag design.

7 So with those points, if there are no further  
8 questions, I would submit.

9 JUDGE McKEOWN, PRESIDING: Thank you.

10 I'd like to thank both counsel for your  
11 arguments today. Very helpful.

12 And we'll now adjourn Brighton Collectibles  
13 versus Coldwater Creek and submit it.

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1 C E R T I F I C A T E

2

3 I, Melanie M. Faulconer, certify  
4 that the foregoing transcript is a true  
5 record of said proceedings, that I am not  
6 connected by blood or marriage with any of  
7 the parties herein, nor interested directly  
8 or indirectly in the matter in controversy,  
9 nor am I in the employ of counsel.

10 I have hereunto subscribed my name  
11 this 18th day of September, 2012.

12

13

Damian Alonzo  
*Damian Alonzo* on behalf of Melanie M. Faulconer

14

MELANIE M. FAULCONER

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| A                                             |                                                                   | B                                                                                        |                                                                                                                                                                                                                                                                                           |
|-----------------------------------------------|-------------------------------------------------------------------|------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| able 19:9                                     | Apple 3:15 4:4,11 5:13<br>5:14 11:14                              | back 12:9 15:5 18:16<br>18:24 25:10 33:2<br>45:4 50:23                                   | braided 29:23                                                                                                                                                                                                                                                                             |
| absence 30:10                                 | applicable 38:15                                                  |                                                                                          | braiding 14:24 15:7<br>51:24,24                                                                                                                                                                                                                                                           |
| absolute 43:23                                | apply 33:24 48:2                                                  |                                                                                          | brand 24:16 38:7,24                                                                                                                                                                                                                                                                       |
| accept 41:8,19                                | appreciate 4:24 8:11<br>49:17                                     | bag 33:5,10 34:9,20,21<br>34:25 35:1,20,21,24<br>37:3 38:7,9 41:3<br>47:10,11            | breadth 5:11                                                                                                                                                                                                                                                                              |
| accessories 35:7 39:25                        | approach 25:17                                                    |                                                                                          | breast 27:21                                                                                                                                                                                                                                                                              |
| accurately 28:20                              | appropriate 5:17                                                  | bags 20:11 29:19<br>34:16 35:16,19 36:14<br>37:3,6,9 41:21 42:1,3<br>42:4 44:22,23 45:10 | brief 20:18 22:11<br>23:16 24:20 32:12                                                                                                                                                                                                                                                    |
| acknowledged 40:18                            | approximates 9:12                                                 |                                                                                          | briefing 2:16                                                                                                                                                                                                                                                                             |
| acquire 15:13 28:1                            | approximation 3:11                                                | base 25:5,14                                                                             | Brighton 1:6 3:6,23,25<br>4:25 5:9 6:13,24<br>11:25 12:24 14:17,22<br>19:7 20:4,6,8,10,12<br>20:12 22:3,5,8,13,19<br>23:25 24:9,10,15<br>26:2,10 33:15 34:13<br>34:14,16,20 35:4,6,7<br>36:10 38:1 39:24,25<br>40:3,4,7 42:2,4 44:3<br>44:4,23 45:6,7,8 47:4<br>47:11,11 50:9,15<br>52:12 |
| acquiring 27:17                               | apropos 10:4 11:12<br>25:11                                       | baseball 27:18 33:9                                                                      | Brightony 34:9                                                                                                                                                                                                                                                                            |
| actual 20:9 30:14 48:8<br>48:12,17,20,21 49:5 | argue 17:4 24:19                                                  | based 19:17 21:2<br>24:15 25:21,22,23<br>41:10,24 50:16 51:18                            | Brighton's 8:11,15<br>15:19 19:24 21:17,25<br>23:15 25:18,22 26:1<br>29:19 32:9 51:23                                                                                                                                                                                                     |
| add 34:23                                     | argued 15:12 16:3                                                 |                                                                                          | broad 12:23 52:3                                                                                                                                                                                                                                                                          |
| adding 35:2                                   | argument 1:16 2:3<br>4:24 7:7 20:2,15<br>38:5 49:18 50:10<br>51:2 |                                                                                          | brocade 14:20 15:7                                                                                                                                                                                                                                                                        |
| addition 11:9,14                              | arguments 9:5 16:1<br>52:11                                       |                                                                                          | brocaded 29:21                                                                                                                                                                                                                                                                            |
| additional 26:18 47:5                         | arithmetic 46:4                                                   |                                                                                          | brought 9:25 19:24                                                                                                                                                                                                                                                                        |
| address 38:12                                 | aside 2:10 9:1                                                    |                                                                                          | brown 14:23                                                                                                                                                                                                                                                                               |
| adjourn 52:12                                 | asked 31:14,22 32:2<br>36:12 51:8                                 |                                                                                          | buds 6:18 12:5                                                                                                                                                                                                                                                                            |
| admits 38:21                                  | asking 17:14 21:8 31:4<br>34:3,8                                  |                                                                                          | burden 31:16 51:5                                                                                                                                                                                                                                                                         |
| adopted 25:8                                  | assemblage 11:22 15:3                                             |                                                                                          | buttons 27:22                                                                                                                                                                                                                                                                             |
| adrift 41:6                                   | assembly 4:2                                                      |                                                                                          | buy 22:19 35:8,11<br>39:25 40:7 41:4 47:4<br>47:11,18                                                                                                                                                                                                                                     |
| ads 34:15                                     | asserted 31:14                                                    |                                                                                          | buying 47:16                                                                                                                                                                                                                                                                              |
| adults 39:13                                  | assume 16:8,9 17:17<br>18:23,24 19:14 22:14<br>32:24              |                                                                                          | buys 22:15                                                                                                                                                                                                                                                                                |
| aggrieved 17:13                               | assumed 31:22                                                     |                                                                                          |                                                                                                                                                                                                                                                                                           |
| ago 33:4                                      | assumes 43:12                                                     |                                                                                          | C                                                                                                                                                                                                                                                                                         |
| agree 16:13 38:25<br>46:11 47:1               | assuming 19:11,11                                                 |                                                                                          | C 53:1,1                                                                                                                                                                                                                                                                                  |
| alike 36:20                                   | assumption 21:22<br>40:19 46:25 47:5                              |                                                                                          | cachet 42:5                                                                                                                                                                                                                                                                               |
| alternative 48:9                              | attempts 16:23                                                    |                                                                                          | calculate 25:12                                                                                                                                                                                                                                                                           |
| amalgamation 9:13                             | attentive 7:25                                                    |                                                                                          | calculation 21:2 45:23                                                                                                                                                                                                                                                                    |
| Americans 39:12                               | authentic 38:24                                                   |                                                                                          |                                                                                                                                                                                                                                                                                           |
| amount 21:7 37:19<br>39:6 43:15               | available 24:10                                                   |                                                                                          |                                                                                                                                                                                                                                                                                           |
| analogy 21:6,10 25:11<br>34:21 35:15 47:14    | average 7:25 35:6<br>39:25                                        |                                                                                          |                                                                                                                                                                                                                                                                                           |
| analyze 32:16                                 | award 20:19 41:22                                                 |                                                                                          |                                                                                                                                                                                                                                                                                           |
| answer 29:25                                  | awarded 3:10 48:19                                                |                                                                                          |                                                                                                                                                                                                                                                                                           |
| antitrust 38:16 43:10                         |                                                                   |                                                                                          |                                                                                                                                                                                                                                                                                           |
| apart 9:9,9                                   |                                                                   |                                                                                          |                                                                                                                                                                                                                                                                                           |
| apiece 39:25                                  |                                                                   |                                                                                          |                                                                                                                                                                                                                                                                                           |
| appeal 1:12 44:23                             |                                                                   |                                                                                          |                                                                                                                                                                                                                                                                                           |
| Appeals 1:2 50:24                             |                                                                   |                                                                                          |                                                                                                                                                                                                                                                                                           |
| appear 15:8                                   |                                                                   |                                                                                          |                                                                                                                                                                                                                                                                                           |
| appearance 44:5 45:9                          |                                                                   |                                                                                          |                                                                                                                                                                                                                                                                                           |
| appeared 39:8                                 |                                                                   |                                                                                          |                                                                                                                                                                                                                                                                                           |
| appears 12:13                                 |                                                                   |                                                                                          |                                                                                                                                                                                                                                                                                           |



|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 45:25<br><b>California</b> 1:12 2:1<br>9:16<br><b>call</b> 20:3<br><b>calls</b> 3:21 20:10 21:22<br><b>capable</b> 28:21 31:8<br><b>capture</b> 7:24<br><b>cards</b> 40:10<br><b>careful</b> 12:18 32:7<br><b>carried</b> 5:23<br><b>case</b> 1:13 3:9,17 9:11<br>9:13,14,16 11:11,15<br>11:17 16:16 18:14<br>20:21,22,23 23:19<br>24:22,23 26:13,16,20<br>27:7 30:10 31:9 36:2<br>36:13 37:5,9,15,16<br>43:22 50:22 51:4,12<br>51:12,20<br><b>cases</b> 4:11,18 5:2 9:10<br>17:9 23:14,15 25:25<br>29:11 42:21 44:1<br><b>catalog</b> 39:15<br><b>catalogs</b> 34:17 39:9<br><b>Cate</b> 2:9<br><b>category</b> 11:7 26:22<br><b>CATHERINE</b> 2:7,14<br>5:3,8 6:8 7:10,17,20<br>8:3,9,22,25 9:14 10:9<br>10:12,19 11:4,8 13:4<br>15:15 16:7,11,13<br>17:21,25 18:3,7,11<br>19:4,11 21:13,17,19<br>21:24 23:1,7,10 24:4<br>24:12,17 25:6,9 26:6<br>49:23<br><b>causes</b> 47:11<br><b>cer</b> 25:12<br><b>certain</b> 4:5 9:8 20:12<br>25:13<br><b>certainly</b> 3:22 6:9<br>11:18 18:11 20:23<br>22:6 33:6 35:17<br><b>certainty</b> 20:25 37:18<br><b>certify</b> 53:3<br><b>chain</b> 35:2 | <b>Chanel</b> 34:25 35:1<br><b>chase</b> 22:9<br><b>cheap</b> 38:23,24 41:13<br>41:17,20,25<br><b>cheaply</b> 22:22<br><b>chevron</b> 7:21 12:5<br><b>chevrons</b> 6:23<br><b>chief</b> 8:12,15<br><b>choice</b> 35:22<br><b>choosing</b> 9:17<br><b>chose</b> 48:23<br><b>Circuit</b> 1:2 11:11,16<br>12:13 15:24 51:13<br><b>circumstances</b> 5:19<br>50:11<br><b>cited</b> 17:9 23:15<br><b>civil</b> 9:3 17:11<br><b>claim</b> 13:17 14:11 24:1<br><b>claimed</b> 15:5 51:25<br><b>claiming</b> 14:17<br><b>clarity</b> 3:9<br><b>clear</b> 40:22<br><b>clearly</b> 29:19 35:1<br><b>Clifton</b> 1:22 40:6,9,17<br>41:1,6,15 42:25<br>46:14,17 47:3 50:13<br><b>clock</b> 2:12<br><b>close</b> 15:3<br><b>closely</b> 9:12<br><b>closing</b> 16:1 20:15<br>50:10<br><b>coherent</b> 42:19<br><b>coincidence</b> 38:11<br><b>coinciding</b> 45:9<br><b>Coldwat</b> 23:25<br><b>Coldwater</b> 1:9 2:9<br>13:22 20:4,11,16,17<br>21:14,15,25 22:14,15<br>22:16 23:11,25 24:8<br>24:10 25:19 29:17<br>30:7,12,19 31:13<br>32:13 34:3,8,17 38:8<br>44:5,22 45:9 52:13<br><b>Coldwater's</b> 6:12<br>16:23 26:2,3 32:10<br>39:11 48:9 | <b>collar</b> 27:21<br><b>collect</b> 35:6<br><b>Collectibles</b> 1:6 52:12<br><b>collection</b> 15:2<br><b>colloquy</b> 32:9<br><b>colors</b> 15:7,12<br><b>combination</b> 5:23 52:2<br><b>combinations</b> 51:22<br>52:2<br><b>come</b> 34:4,9 35:9,10<br>40:11 44:22 47:20<br><b>comes</b> 5:10 7:3 14:1<br>16:14 27:6<br><b>coming</b> 41:9<br><b>commend</b> 5:13<br><b>comment</b> 8:4<br><b>committed</b> 2:24<br><b>common</b> 6:20 10:1<br>12:22,22 13:16 15:6<br>52:5<br><b>company</b> 39:21<br><b>comparable</b> 23:18<br>25:23<br><b>comparison</b> 10:4 33:8<br>33:8,9 50:15<br><b>competition</b> 12:19<br><b>compilation</b> 4:14,15<br>11:13,22 33:15<br><b>complicated</b> 43:4<br><b>component</b> 3:19<br><b>compose</b> 51:15<br><b>conceded</b> 8:12<br><b>concededly</b> 3:19<br><b>conceive</b> 51:17<br><b>concession</b> 8:14<br><b>concluded</b> 9:21 11:16<br>26:16 41:13<br><b>concluding</b> 18:19<br><b>conference</b> 31:12<br><b>conferred</b> 3:24<br><b>confidence</b> 46:21<br><b>confronting</b> 11:13<br><b>confused</b> 8:2 22:22<br><b>confusing</b> 28:18<br><b>confusion</b> 17:6<br><b>conjunction</b> 14:19 | <b>connect</b> 43:6<br><b>connected</b> 53:6<br><b>connection</b> 40:12<br><b>conservative</b> 50:12<br><b>Consolidated</b> 1:4<br><b>constellation</b> 42:9<br>50:1<br><b>constraint</b> 12:11<br><b>construct</b> 42:10<br><b>consumer</b> 23:20 47:25<br><b>context</b> 7:13<br><b>continuing</b> 45:6<br><b>contours</b> 16:25 19:14<br><b>contrary</b> 41:12<br><b>controversy</b> 53:8<br><b>convenient</b> 21:22<br>40:19<br><b>conversation</b> 6:12<br><b>copied</b> 11:1<br><b>copy</b> 10:11<br><b>copying</b> 5:17<br><b>copyright</b> 2:20 3:13,21<br>3:22,24 4:3,9 7:4 9:5<br>9:10,21,22,23 10:2,7<br>10:18 11:19 12:14,17<br>18:19 38:16 43:10<br>48:11<br><b>copyrightable</b> 7:2<br><b>copyrighted</b> 12:6,8<br><b>core</b> 12:20<br><b>correct</b> 10:19 43:19<br>48:18 50:2<br><b>correctly</b> 3:6<br><b>correspondence</b> 21:25<br><b>cost</b> 38:8<br><b>costs</b> 44:24<br><b>counsel</b> 6:12 15:19<br>16:23 32:10,10 50:9<br>51:23 52:10 53:9<br><b>counsel's</b> 20:15 50:21<br><b>counterfeit</b> 41:20<br><b>counterfeiting</b> 47:24<br>47:25<br><b>country</b> 39:11,13,23<br><b>coup</b> 46:6<br><b>couple</b> 15:9 46:9 49:24 |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|
| <b>course</b> 2:19 3:5 8:17<br>8:17 10:6 13:13<br>15:12 17:8 19:13<br><b>court</b> 1:2,12 2:8,20,24<br>3:14,21 4:18 5:14<br>9:1 13:21 14:4 15:24<br>16:15,15 17:18 18:15<br>18:17 20:20 24:22<br>26:14,16,17 27:12<br>30:7,8,11,17 31:20<br>31:21 32:8,21 37:16<br>37:21 38:14 43:12<br>50:24 51:2<br><b>courts</b> 14:9<br><b>Court's</b> 9:18 12:12<br>24:22 25:18 28:17<br><b>cowhide</b> 14:20<br><b>crafted</b> 30:11,12 32:19<br><b>created</b> 12:1 34:25<br><b>Creek</b> 1:9 2:9 13:22<br>52:13<br><b>Creek's</b> 34:17<br><b>critical</b> 28:13 41:8<br><b>cross</b> 43:18<br><b>crosshatching</b> 34:23<br><b>crosswise</b> 31:9<br><b>CSR</b> 1:25<br><b>cuffs</b> 27:21<br><b>customer</b> 17:5 20:10<br>22:3 23:4,8,12 24:8,9<br>35:7 50:5<br><b>customers</b> 20:12 22:5<br>22:7 39:24 40:3,4<br>42:16<br><b>cut</b> 7:12 22:9<br><b>cutoff</b> 17:4                      | 39:6 41:7 42:20,21<br>43:23 44:15 45:18,21<br>48:9,12,17,20,21,23<br>49:5,11 50:20<br><b>data</b> 3:7 20:8 21:3,5<br>23:2,18,21,23 24:23<br>24:24 25:5,22 35:10<br>45:3 50:2,3,17<br><b>day</b> 53:11<br><b>dealing</b> 8:7,8<br><b>dealt</b> 17:10<br><b>decades</b> 6:19<br><b>decides</b> 37:3<br><b>decorative</b> 4:7<br><b>defendant</b> 3:1 43:12<br><b>Defendant-Appellant</b><br>1:10<br><b>definitely</b> 42:14 43:5<br><b>definition</b> 27:16<br><b>degree</b> 11:2<br><b>delta</b> 45:20<br><b>demand</b> 25:18<br><b>demonstrate</b> 25:25<br><b>depend</b> 37:14<br><b>depending</b> 23:19<br><b>depends</b> 4:11<br><b>depictions</b> 10:23<br><b>describe</b> 28:20 32:12<br><b>described</b> 14:10 42:3,6<br>50:1 52:4<br><b>describes</b> 21:21<br><b>describing</b> 20:9 23:8<br><b>description</b> 14:15<br><b>descriptive</b> 15:13 19:3<br>33:19,25<br><b>design</b> 3:18 6:18,20<br>10:1,5 11:9 12:1,2,6<br>12:7,11,16 13:15,18<br>26:15,21 29:2,4<br>35:22 51:14 52:6<br><b>designed</b> 3:23 6:16<br>12:25<br><b>designer</b> 3:23 6:13,24<br>8:11 11:25<br><b>designers</b> 34:4,8<br><b>designs</b> 9:24 11:6,10 | 12:19 51:12<br><b>detailed</b> 9:18<br><b>determination</b> 36:13<br>41:8<br><b>determine</b> 17:18 33:2<br><b>determined</b> 37:8<br><b>determines</b> 37:6<br><b>difference</b> 27:5,6<br><b>differences</b> 8:13<br><b>different</b> 4:16 5:22 6:6<br>6:9 7:22 8:21,21<br>11:19 14:1,9 17:7<br>22:25 28:5 29:17<br>51:15,17,21<br><b>difficult</b> 8:10 19:14<br><b>difficulty</b> 42:7 47:5<br><b>diminishes</b> 44:23<br><b>diminution</b> 24:16 26:1<br><b>directly</b> 11:1 53:7<br><b>disappears</b> 22:24<br><b>discuss</b> 9:6 15:19<br>20:18 26:18<br><b>discussed</b> 11:14 26:14<br><b>discussing</b> 9:2<br><b>discussion</b> 17:5 28:14<br><b>distinctive</b> 29:21 33:7<br>34:2,19 35:13<br><b>distributed</b> 39:9<br><b>District</b> 1:12,12,13<br>9:16<br><b>divide</b> 22:4<br><b>doll</b> 6:6<br><b>domain</b> 10:1<br><b>doodads</b> 5:6<br><b>dots</b> 7:19 12:5<br><b>Dr</b> 23:2 46:23<br><b>draft</b> 32:9<br><b>drafting</b> 30:14<br><b>draw</b> 24:24<br><b>drawn</b> 21:5<br><b>dreamed</b> 10:15,16<br><b>dress</b> 2:23 3:1,3 9:6,22<br>12:17 13:2,9,17,23<br>14:2,8,11,17,18,23<br>15:4,9,22 16:18,20<br>16:25 17:1,19 18:19 | 19:1,2,13,15 26:3,15<br>27:8 28:23 29:3,9,19<br>31:16 34:19 36:24<br>37:5 48:15,16 51:4<br>51:15,17,22,24 52:2<br><b>due</b> 43:10 |
| <b>E</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                    |
| <b>E</b> 2:7,14 5:3,8 6:8 7:10<br>7:17,20 8:3,9,22,25<br>9:14 10:9,12,19 11:4<br>11:8 13:4 15:15 16:7<br>16:11,13 17:21,25<br>18:3,7,11 19:4,11<br>21:13,17,19,24 23:1<br>23:7,10 24:4,12,17<br>25:6,9 26:6 49:23<br>53:1,1<br><b>earlier</b> 9:20 12:12<br>36:12<br><b>easily</b> 22:22<br><b>easy</b> 14:4<br><b>effect</b> 31:18 42:3,5<br><b>either</b> 9:4,5 18:16 37:9<br>39:14<br><b>element</b> 25:13<br><b>elements</b> 3:15 4:2,13<br>4:21 6:17,20,25<br>11:18,21,22 12:20,22<br>14:11,16,18,20 15:3<br>15:5 51:17<br><b>elicit</b> 5:17<br><b>Ellen</b> 38:22<br><b>embellished</b> 29:21<br>33:5 35:3<br><b>embellishment</b> 27:24<br>35:21<br><b>embossed</b> 29:22<br><b>emphasize</b> 8:10<br><b>employ</b> 53:9<br><b>ended</b> 26:7<br><b>Enterprises</b> 50:22<br><b>entire</b> 39:22<br><b>entitled</b> 40:16<br><b>erred</b> 2:20<br><b>error</b> 2:24 9:2,7 13:20 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                    |

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|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 16:5,12,19 17:11,17<br>19:9 28:16 29:10,13<br>32:25<br><b>ESQ</b> 2:7,14 5:3,8 6:8<br>7:10,17,20 8:3,9,22<br>8:25 9:14 10:9,12,19<br>11:4,8 13:4 15:15<br>16:7,11,13 17:21,25<br>18:3,7,11 19:4,11<br>21:13,17,19,24 23:1<br>23:7,10 24:4,12,17<br>25:6,9 26:6,9,24<br>27:10 28:17 29:7<br>30:3,6,17,20 31:25<br>32:4,21 33:3,12,16<br>33:20,24 34:7 35:10<br>36:1,7,9,11,18,22,25<br>37:13,24 38:3,12,19<br>39:3,5,16,19 40:8,15<br>40:25 41:5,11,25<br>42:18 43:1,8,15,20<br>43:24 44:7,10,16,25<br>45:2,11,14,22 46:1,5<br>46:9,16,22 47:13<br>48:6,11,13,16,19<br>49:1,3,8,10,16,21,23<br><b>essence</b> 21:9 23:16<br><b>essentially</b> 21:4 38:24<br>50:20 52:3<br><b>establish</b> 16:24 23:17<br><b>estimate</b> 22:6 25:17,20<br>38:2 39:6,11 47:20<br>49:13<br><b>estimated</b> 40:14<br><b>estimates</b> 43:17<br><b>estimating</b> 25:19<br><b>estimation</b> 37:20,25<br>43:13<br><b>event</b> 51:7<br><b>everyday</b> 34:12<br><b>evidence</b> 3:8 17:12<br>21:3 39:8 42:6 44:2<br><b>exact</b> 19:12 47:14<br><b>exactly</b> 14:16 15:4<br>16:25 18:7 21:20<br>23:3 24:17 25:20 | 41:12 44:11,21<br><b>examined</b> 23:22<br><b>example</b> 6:7 10:8<br>13:12 44:3<br><b>excerpt</b> 13:7<br><b>excerpts</b> 6:11 8:14<br>14:14 19:25 20:5<br>50:6,8,9 51:1<br><b>exist</b> 37:5<br><b>exists</b> 3:22<br><b>expensive</b> 20:11 22:23<br><b>expert</b> 3:6 19:24 20:14<br>21:4 26:1 35:19 36:3<br>38:1,21,21,22 40:18<br>47:23<br><b>expertise</b> 47:24<br><b>experts</b> 38:25 41:12<br>42:3 47:1<br><b>explain</b> 14:4<br><b>explained</b> 14:5 43:5<br><b>explored</b> 14:9<br><b>expression</b> 5:16,20,22<br><b>extend</b> 4:3<br><b>extends</b> 10:2<br><b>extent</b> 4:5 7:2,11<br><b>extra</b> 27:14 | <b>fashion</b> 41:22<br><b>Faulconer</b> 1:24 53:3<br>53:14<br><b>faulty</b> 13:6<br><b>favor</b> 19:7<br><b>features</b> 51:18<br><b>feel</b> 42:8,13 47:17,19<br><b>feeling</b> 43:3<br><b>fence</b> 12:18,24 14:12<br>52:4<br><b>field</b> 50:5<br><b>figure</b> 4:15 30:4 31:11<br>38:6 41:23,23<br><b>figuring</b> 24:14<br><b>find</b> 2:21,25 16:17<br>19:25 20:5 21:6<br>23:16 37:4 40:20<br>46:3,18 51:1<br><b>finding</b> 28:21<br><b>findings</b> 51:19<br><b>fine</b> 41:22<br><b>first</b> 15:1 18:17<br><b>five</b> 2:10 39:13 47:17<br><b>flesh</b> 39:15<br><b>Fletcher</b> 1:21 6:1 7:6<br>7:11,18,21 8:7,17<br>12:10 13:14 21:10,16<br>21:18,23 22:9 23:5,9<br>24:3,6,13 25:21<br>30:14,18,23,25 31:2<br>33:11 35:18 36:12,15<br>36:17,19,21 37:22,25<br>38:4,18 39:2,4,14,17<br>42:12 44:2,8,20 45:1<br>45:3,12,17 48:23<br><b>flip</b> 12:7<br><b>floating</b> 42:17<br><b>flower</b> 6:17 12:5<br><b>focus</b> 2:17 9:5 20:1<br><b>following</b> 14:19 39:8<br>45:20<br><b>forecasts</b> 23:20<br><b>foregoing</b> 53:4<br><b>forever</b> 12:18<br><b>forward</b> 19:24 40:20<br><b>found</b> 3:1 17:13 28:12 | 29:8,9,14,17 40:2<br>46:12,19 48:17 49:5<br>49:5 51:10<br><b>foundation</b> 40:20<br>46:18<br><b>front</b> 3:7 50:7<br><b>full</b> 3:4 13:24<br><b>fun</b> 22:22<br><b>function</b> 8:5<br><b>funny</b> 36:3<br><b>further</b> 17:5 52:7<br><b>futures</b> 51:15 |
| <b>G</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                  |
| <b>Gambini</b> 17:10 29:11<br><b>gazillion</b> 5:1,4,9<br><b>general</b> 9:10<br><b>generally</b> 6:20<br><b>generic</b> 3:3 13:3,5,9,12<br>13:15,23 14:2,5,7<br>15:6,21,21 16:4,17<br>16:18,21 17:19,22<br>18:25 19:2 27:4,8,16<br>27:25 28:7,10,22,23<br>29:1,2,9,20,24 30:10<br>30:15 31:6,14 33:6<br>33:12 34:22 35:1,17<br>35:21,25 36:14,19,24<br>37:3,7 50:25 51:10<br><b>genericness</b> 17:3,4<br>26:11,18 27:14,15<br>28:20 29:18 30:8<br>31:15 32:6,14,23<br>33:1<br><b>generic/generic</b> 33:23<br><b>getting</b> 15:5<br><b>give</b> 29:12 31:20 34:21<br>43:9 46:21 49:19<br><b>given</b> 6:3 27:12 29:13<br>29:15,18 32:2,11,15<br>33:16 39:7 40:2<br>49:12 51:16<br><b>giving</b> 32:17<br><b>glued</b> 48:5<br><b>go</b> 5:6 15:11 16:4 29:5<br>31:10 33:2 39:5 41:3                                                                                                                                                                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                  |

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|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 45:6<br>goes 25:9 28:20<br>going 8:2 12:9 19:7<br>26:11 34:24 38:13<br>44:4,5 52:1<br><b>Goldstein-Lynch</b><br>38:22<br><b>good</b> 2:8 22:6 26:6,9<br>32:7 35:15 39:23<br>44:19<br><b>granted</b> 18:13,18<br><b>great</b> 48:4<br><b>grew</b> 10:13<br><b>guess</b> 11:5 15:18 18:25<br>30:23 31:3,21 45:15<br>49:4                                                                                                                                                                                                                                                                                                                                                                     | <b>helpful</b> 45:10 52:11<br><b>hereunto</b> 53:10<br><b>Hey</b> 34:20<br><b>hierarchy</b> 26:23 33:14<br>33:17 34:1<br><b>highly</b> 29:20 33:5<br><b>holding</b> 38:15<br><b>Honor</b> 9:15,20 15:2<br>17:21 24:18 25:20<br>27:10 41:11 49:21<br><b>Honors</b> 2:8 26:9 49:24<br><b>hotbed</b> 12:14<br><b>house</b> 3:14 4:4 11:14<br>11:15 40:10<br><b>Huff</b> 1:13 31:7 32:7<br><b>huge</b> 39:20<br><b>hundreds</b> 6:19 39:10<br><b>hypothetical</b> 50:14<br>51:7                                                                                                                                                                                                           | <b>infringement</b> 26:3<br>51:4<br><b>inherently</b> 34:1<br><b>innovations</b> 12:19<br><b>inquiry</b> 50:17<br><b>inserting</b> 30:14<br><b>instance</b> 18:17<br><b>instructed</b> 2:21,25<br>13:8,21,23 16:20<br>17:2<br><b>instructing</b> 3:2<br><b>instruction</b> 9:4 13:2,5<br>13:7 15:2,4,20 16:15<br>17:14,20 28:6,19<br>29:12,13,15,18 30:6<br>30:11,15 31:12,17,18<br>32:7,11,18,24,25<br>51:3,3,8<br><b>instructions</b> 9:3 16:9<br>17:11 18:15 28:13<br>29:6 31:22 32:15,17<br><b>instructive</b> 6:14 9:22<br>51:11<br><b>intellectual</b> 14:13<br><b>interested</b> 9:2 53:7<br><b>interrogatories</b> 14:16<br><b>interrogatory</b> 51:25<br><b>intersects</b> 43:25<br><b>involving</b> 11:15<br><b>irrelevant</b> 12:6 50:16<br><b>issue</b> 2:19,23 3:5,14<br>6:15 9:21,23 13:2<br>14:10 18:16 19:21,23<br>24:24 26:12 32:23<br>33:1 44:4<br><b>issues</b> 2:15,18 15:1<br>18:19<br><b>item</b> 27:9 29:24 39:18<br><b>items</b> 51:10 | 8:23 9:9 10:6,10,14<br>10:20 11:5,18 12:10<br>13:1,8,13 15:11,16<br>16:8,12,14 17:16,24<br>18:1,4,8,21 19:5<br>21:10,16,18,23 22:9<br>23:5,9 24:3,6,13 25:3<br>25:7,20 26:4,7,19,25<br>28:3,24 30:1,4,14,16<br>30:17,18,23,24,25<br>31:1,2,3,7,8 32:1,7,8<br>32:10,20,22 33:11,13<br>33:18,22 34:5 35:8<br>35:18 36:6,8,10,12<br>36:15,16,17,19,20,21<br>36:23 37:11,22,25<br>38:4,18 39:2,4,14,17<br>40:6,9,17 41:1,6,15<br>42:7,12,19,25 43:2<br>43:14,17,21,25 44:2<br>44:8,14,18,20 45:1,3<br>45:12,15,17,24 46:2<br>46:8,14,17 47:3,22<br>48:7,18,21,23,24<br>49:2,4,9,15,17,22<br>50:1,13 51:1 52:9<br><b>judgment</b> 18:5,10,13<br>18:18 35:15 36:19<br>48:20<br><b>jurors</b> 51:16<br><b>jury</b> 2:21,21,25 3:3,7,9<br>9:3,4 13:2,5,21,22<br>14:5 15:1,3,20 16:4,9<br>16:19 17:2,11,13,23<br>18:15,20 19:1,7 28:6<br>28:13,21 29:8,14,16<br>31:5,12 33:2 37:3,6<br>37:20 38:2 39:5 40:2<br>40:15 46:11,12,21,24<br>48:16 49:12 50:7,10<br>50:24 51:7,10 52:1<br><b>justify</b> 46:14 |
| <b>H</b><br><b>hamburger</b> 14:6<br><b>handbag</b> 27:23 36:3<br>36:10 44:4,6 52:6<br><b>handle</b> 34:24 35:2<br><b>handles</b> 29:23 33:10<br>34:22<br><b>happened</b> 44:12<br><b>happening</b> 31:12<br><b>happens</b> 40:1<br><b>hard</b> 13:13 30:9 35:19<br>38:6,17<br><b>harm</b> 38:23<br><b>harmless</b> 9:2,7 16:5,19<br>17:11,20 29:10,13<br><b>Harper</b> 3:14 4:4 11:13<br>11:15<br><b>head</b> 6:22<br><b>hear</b> 26:5 31:2<br><b>heard</b> 51:23<br><b>heart</b> 3:18,19,24,25<br>4:7,7,8 6:3,5,6,10,13<br>6:15,24 7:3,4,14,15<br>7:22 8:11 9:13 11:25<br>12:3,21,24 14:19<br><b>hearts</b> 5:5 8:13,15<br>12:5 14:21 29:23<br><b>HELD</b> 1:19<br><b>help</b> 2:13 42:8 | <b>I</b><br><b>idea</b> 10:13 12:23 50:3<br><b>ideas</b> 25:24<br><b>identical</b> 4:8,22 7:4,24<br>8:16,18,24<br><b>identity</b> 9:11<br><b>identified</b> 13:16 40:13<br><b>identity</b> 4:22 5:18,24<br><b>ill-defined</b> 19:15<br><b>immediately</b> 8:1<br><b>important</b> 18:16 51:3<br><b>importing</b> 21:14 24:25<br><b>impossible</b> 37:4<br><b>incapable</b> 27:17<br><b>including</b> 14:20<br><b>inconsistent</b> 51:19<br><b>incredibly</b> 52:5<br><b>increment</b> 19:17<br><b>indirectly</b> 53:8<br><b>individual</b> 3:18<br><b>industries</b> 25:23<br><b>industry</b> 12:20,22<br>15:7<br><b>informed</b> 38:2<br><b>infringe</b> 4:7<br><b>infringed</b> 7:5 | <b>J</b><br><b>JANUARY</b> 1:17 2:2<br><b>job</b> 39:23<br><b>judge</b> 1:13,20,21,22<br>2:12 4:10 5:4 6:1 7:6<br>7:11,18,21 8:7,17,19                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         | <b>K</b><br><b>keep</b> 19:6<br><b>Kennedy</b> 17:10,15                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 29:11<br><b>kind</b> 7:11 10:17 12:11<br>38:7 41:6 42:11 43:2<br>46:3<br><b>kinds</b> 47:8<br><b>knocked</b> 50:23<br><b>knock-off</b> 22:19 34:12<br>42:15<br><b>knock-offs</b> 38:23,25<br>39:8,12,14,20,22<br>41:2,14,17,20 42:1<br><b>know</b> 6:19,20 9:1 11:2<br>12:13 15:12 16:19<br>19:2,21 21:7 23:16<br>23:24 25:10 27:5,25<br>28:14 29:1,5 31:8<br>32:23 33:22 39:19<br>42:21 43:4,8 45:13<br>45:14 47:22 50:14                                                                                                                                                                              | <b>line</b> 25:4 27:3 34:12<br>51:16<br><b>link</b> 34:24 35:2<br><b>litigation</b> 12:14<br><b>little</b> 5:25 7:19,22<br>11:15 14:8 22:1 43:3<br>47:14<br><b>logic</b> 29:7<br><b>logical</b> 40:20 45:17<br><b>logically</b> 27:13<br><b>longer</b> 26:21 42:4<br><b>look</b> 2:13 4:8 6:11,21<br>6:22,23 7:16 14:14<br>16:3 21:19 23:14,17<br>23:18,18,20,20 29:20<br>33:4 34:9,20 35:15<br>36:20 50:25<br><b>looked</b> 4:19<br><b>looking</b> 7:14,15 11:5<br>16:1<br><b>looks</b> 50:19<br><b>loss</b> 50:10<br><b>lost</b> 3:9 20:3,4,6,10,23<br>22:3 23:4,8,11,15,17<br>23:24,25,25 24:4,7<br>24:15,24 25:18,24<br>50:5,14<br><b>lot</b> 23:14 40:19,24<br><b>lots</b> 6:4 42:15<br><b>Louie</b> 41:21,21<br><b>love</b> 35:5<br><b>Lowry</b> 4:5 | <b>markings</b> 27:18<br><b>marriage</b> 53:6<br><b>massaging</b> 24:25<br><b>matching</b> 42:13<br><b>mathematical</b> 20:24<br><b>Mattel</b> 3:15 5:9,10,11<br><b>matter</b> 17:19 29:7,24<br>53:8<br><b>McKEOWN</b> 1:20 2:12<br>4:10 5:4 8:19,23 9:9<br>10:6,10,14,20 11:5<br>11:18 13:1 15:11,16<br>16:8,12,14 17:16,24<br>18:1,4,8,21 19:5 25:3<br>25:7 26:4,7,19,25<br>28:3,24 30:1,4,24<br>31:1,3 32:1,20,22<br>33:13,18,22 34:5<br>35:8 36:6,8,10,15,16<br>36:20,23 37:11 42:7<br>42:19 43:2,14,17,21<br>43:25 44:14,18 45:15<br>45:24 46:2,8 47:22<br>48:7,18,21,24 49:2,4<br>49:9,15,17,22 50:1<br>51:1 52:9<br><b>mean</b> 4:22 6:3 7:7,8<br>10:17 17:24 21:16,18<br>25:9 30:4 31:21,23<br>33:25 35:18,23 38:9<br>40:21,23 41:2,19<br>43:4,21 47:7<br><b>meaning</b> 3:2 10:7<br>13:10,19 15:14,21<br>16:17 17:5 19:6<br>26:17 27:1,7,17 28:1<br>28:7,10,22 29:1,4,5,8<br>31:19 34:6<br><b>meaningless</b> 50:19<br><b>means</b> 10:10 11:19<br>40:24<br><b>Melanie</b> 1:24 53:3,14<br><b>mentioned</b> 9:20<br><b>merging</b> 34:6<br><b>metal</b> 34:24<br><b>metallic</b> 35:2 | <b>Michigan</b> 34:11<br><b>middle</b> 7:21<br><b>million</b> 35:5 39:9,12<br>39:24<br><b>mind</b> 44:11<br><b>minutes</b> 2:10 49:19<br><b>misdetermination</b><br>16:17<br><b>misstate</b> 16:9<br><b>misstates</b> 15:23<br><b>mistake</b> 21:11,14<br><b>mixing</b> 42:13<br><b>modicum</b> 9:25<br><b>moment</b> 33:4<br><b>monetize</b> 25:12,16<br><b>Monica</b> 34:10<br><b>morning</b> 2:8,16 26:9<br><b>mother</b> 47:7<br><b>move</b> 4:22 13:1 42:23<br>47:13<br><b>multiple</b> 4:19 52:2<br><b>multiplier</b> 20:17<br><b>Murphy</b> 20:21 50:22 |
| <b>L</b><br><b>L</b> 1:13<br><b>laid</b> 19:18 45:17<br><b>Laughter</b> 36:5<br><b>law</b> 2:23 3:14 10:7,8<br>11:20 15:23 17:19<br>29:24<br><b>lawyer</b> 17:3<br><b>le</b> 18:9<br><b>leapfrog</b> 16:16<br><b>leather</b> 14:20,23 15:7<br>27:23 33:10,10 34:21<br>34:22<br><b>led</b> 20:17,18<br><b>left</b> 6:21 37:20<br><b>legal</b> 2:17 6:15 13:20<br>18:9 28:16 32:25<br><b>legally</b> 16:9<br><b>legitimate</b> 50:4<br><b>lessons</b> 29:11<br><b>letter</b> 29:22<br><b>let's</b> 16:8 17:17 18:23<br>18:24 19:1<br><b>life</b> 36:4<br><b>liked</b> 47:8<br><b>limited</b> 6:2 8:5 17:1 | <b>M</b><br><b>M</b> 1:20,24 53:3,14<br><b>main</b> 9:5<br><b>making</b> 46:25<br><b>MARGARET</b> 1:20<br><b>Marilyn</b> 1:13<br><b>mark</b> 13:9 15:21 27:8<br>28:7,10 29:2 30:15<br><b>market</b> 23:17 25:22<br>35:4,20,23 44:22<br>52:5<br><b>marketing</b> 8:12,15<br>39:22                                                                                                                                                                                                                                                                                                                                                                                                                                                                           | <b>N</b><br><b>name</b> 2:9 53:10<br><b>narrow</b> 5:16,21 21:10<br><b>narrowness</b> 5:12<br><b>necessarily</b> 39:17<br>41:17<br><b>need</b> 2:21 10:17 19:8<br>20:23 21:1 24:23<br>27:14 28:2 29:1,4<br>43:23<br><b>needed</b> 18:20<br><b>needling</b> 43:3<br><b>never</b> 20:13 30:12<br>37:16 40:6 47:4,11<br>47:15<br><b>new</b> 11:20<br><b>Ninth</b> 1:2 11:16 15:24<br><b>nomenclature</b> 14:1<br><b>non-generic</b> 31:17<br><b>non-genericness</b> 51:5<br>51:9<br><b>normally</b> 33:1 42:10                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |



|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
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| <p>Northern 9:16<br/> Nos 1:4<br/> notes 37:21<br/> notion 5:11 7:25 12:15<br/> 17:12 47:10<br/> novel 11:21<br/> number 2:15,19,23<br/> 6:2,9 19:16 21:21<br/> 22:1,4 24:15 39:20<br/> 40:12 41:10 43:23<br/> 46:19,21,23,24,25,25<br/> 48:25 50:14,18,19<br/> 51:21<br/> numbers 40:11,19<br/> 42:9 44:9,10 45:12<br/> 45:19,20 46:2,12<br/> 48:2,17</p> <hr/> <p><b>O</b></p> <p>object 32:1,11<br/> objected 32:14<br/> objection 30:18 32:3<br/> 32:18<br/> objections 31:23 32:16<br/> obviously 48:24<br/> offense 31:15<br/> offered 41:10 46:15,17<br/> offers 20:2<br/> officer 8:12,15<br/> Oh 33:16 36:18 37:10<br/> 41:3<br/> okay 2:14 7:19 36:18<br/> 37:13,23 38:3,12<br/> 45:25 46:8,15 49:9<br/> old 24:21<br/> omitted 51:2<br/> once 42:20<br/> one-fifth 42:2<br/> open 30:17 32:8<br/> opportunities 20:6<br/> opposed 10:14<br/> ORAL 1:16 2:3<br/> order 4:6 17:9 23:2<br/> organizer 11:16<br/> original 3:20 10:24<br/> originality 9:25 10:3,7</p> | <p>10:10,17<br/> outcome 17:7<br/> outside 4:1<br/> overinclusive 52:3<br/> overreading 5:9<br/> overturned 37:17<br/> 50:24<br/> owner 34:11<br/> owns 35:7</p> <hr/> <p><b>P</b></p> <p>Page 5:12 21:19 50:25<br/> paid 21:7<br/> pan 29:6<br/> panel 15:23<br/> paper 8:10<br/> papers 30:22<br/> Parchment 37:15<br/> 38:14 43:9 50:21<br/> Parlor 50:22<br/> parse 16:2<br/> part 9:7 15:8 18:18<br/> 22:20 45:21,22,24<br/> 48:19 51:24 52:5<br/> particular 4:1 12:20<br/> 13:17 20:1 45:7<br/> particularly 12:15<br/> 38:15<br/> parties 53:7<br/> party 17:14<br/> PASADENA 2:1<br/> passed 7:12<br/> patent 10:8 11:20<br/> path 17:18 19:12<br/> pattern 34:23<br/> Pause 26:8<br/> people 12:4 22:19,20<br/> 34:2,10,12,15,19,24<br/> 35:3,5 39:20 41:16<br/> 42:15 46:25 47:15,16<br/> 47:18,20<br/> percent 40:4<br/> percentage 48:1<br/> permitted 17:3<br/> permutations 51:22<br/> persistent 16:23</p> | <p>person 22:15<br/> Peter 26:9,9,24 27:10<br/> 28:17 29:7 30:3,6,17<br/> 30:20 31:25 32:4,21<br/> 33:3,12,16,20,24<br/> 34:7 35:10 36:1,7,9<br/> 36:11,18,22,25 37:13<br/> 37:24 38:3,12,19<br/> 39:3,5,16,19 40:8,15<br/> 40:25 41:5,11,25<br/> 42:18 43:1,8,15,20<br/> 43:24 44:7,10,16,25<br/> 45:2,11,14,22 46:1,5<br/> 46:9,16,22 47:13<br/> 48:6,11,13,16,19<br/> 49:1,3,8,10,16,21<br/> phrase 5:10 14:12<br/> pieces 3:19<br/> pin 38:17<br/> pink 19:6<br/> place 33:13,15<br/> plain 27:18 33:10<br/> 34:21<br/> plainly 9:7 19:23 20:5<br/> plaintiff 26:16 51:4,9<br/> Plaintiff-Appellee 1:7<br/> plaster 6:22<br/> play 19:13,16<br/> playing 22:1<br/> please 2:8,11<br/> pleasure 22:23<br/> pocket 27:21<br/> point 15:6 19:20 24:2<br/> 24:21 28:17 36:4<br/> 43:18 44:13 46:22<br/> 50:20 51:10<br/> pointed 20:20 50:13<br/> 51:2<br/> points 14:21 46:9<br/> 49:24 52:7<br/> Polar 20:21 21:1 24:22<br/> 50:21<br/> popular 40:23<br/> popularity 40:24<br/> possibly 28:1<br/> power 39:22</p> | <p>powerful 39:21<br/> precedence 9:18 12:12<br/> 25:18<br/> precise 41:23 42:23<br/> precisely 21:11<br/> precision 43:23<br/> predicate 20:8 21:15<br/> 21:18 23:11 51:8<br/> predominant 2:17<br/> presented 51:7<br/> PRESIDING 1:20<br/> 2:12 4:10 5:4 8:19<br/> 8:23 9:9 10:6,10,14<br/> 10:20 11:5 13:1<br/> 15:11,16 16:8,12<br/> 17:16,24 18:1,4,8,21<br/> 19:5 25:3,7 26:4,7,19<br/> 26:25 28:3,24 30:1,4<br/> 30:24 31:1,3 32:1,20<br/> 32:22 33:13,18,22<br/> 34:5 35:8 36:6,8,10<br/> 36:16,20,23 37:11<br/> 42:7,19 43:2,14,17<br/> 43:21,25 44:14,18<br/> 45:15,24 46:2,8<br/> 47:22 48:7,18,21,24<br/> 49:2,4,9,15,17,22<br/> 52:9<br/> presumption 42:11<br/> price 22:12,13 42:2<br/> probably 11:12 19:16<br/> problem 15:18 20:14<br/> 20:20 21:4,9 23:2,22<br/> 28:24 30:24 31:7<br/> 41:9 50:6<br/> problems 10:21<br/> proceeding 26:8<br/> proceedings 53:5<br/> product 10:5 13:15,18<br/> 22:13,14,15,23 24:8<br/> 26:15,21 27:16 28:22<br/> 35:5 45:7 47:4 52:5<br/> Productions 20:21<br/> 21:2 24:23<br/> products 11:6 12:16<br/> 19:16 20:7 22:19</p> |
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|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 23:18 25:23 44:3<br>45:6,8 47:8,8,9 51:16<br><b>profits</b> 3:9 20:24<br>23:15,17 24:5,24<br>25:18,24 48:10,12,17<br>49:6,7<br><b>proof</b> 13:18<br><b>properly</b> 29:15<br><b>property</b> 14:13<br><b>proposed</b> 32:14 46:13<br><b>proposition</b> 41:19<br><b>protect</b> 10:2<br><b>protectability</b> 5:12<br><b>protectable</b> 3:16,20,23<br>5:15,20 11:23,24<br>12:1,2 26:15 27:9<br><b>protection</b> 3:4 4:9<br>11:2 13:11,14,24<br>14:13 28:8,11<br><b>prove</b> 26:17 27:1<br><b>proven</b> 37:18,19 43:11<br>51:9<br><b>proving</b> 26:14<br><b>public</b> 10:1<br><b>pulling</b> 25:24<br><b>purchasing</b> 23:21<br><b>purely</b> 46:18<br><b>purportedly</b> 40:14<br><b>purpose</b> 7:12 48:8<br>49:4<br><b>purposes</b> 32:25<br><b>purse</b> 22:15,16<br><b>purses</b> 22:21 35:19<br><b>pushed</b> 40:19<br><b>put</b> 3:6 4:13,21 6:25<br>7:18 10:25 12:3,11<br>17:23 27:7 47:17,19<br>50:7 52:1 | 25:3 35:14 36:11<br>45:3,19 51:6,8<br><b>questioned</b> 37:16<br><b>questions</b> 18:5 32:22<br>49:25 52:8<br><b>quick</b> 46:9 49:24<br><b>quickly</b> 19:20 50:25<br><b>quilt</b> 34:23<br><b>quilting</b> 35:2<br><b>quite</b> 7:24 22:17<br><b>quote</b> 51:11                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | 13:7 14:14 16:22<br>19:25 20:5 28:15<br>44:2,11 45:13 50:3,6<br>50:8,8 51:1 53:5<br><b>recover</b> 48:11<br><b>referencing</b> 13:2,5<br><b>reiterated</b> 50:9<br><b>related</b> 18:22 43:6<br><b>relationship</b> 40:21<br><b>relatively</b> 9:19 14:4<br>25:10 51:12<br><b>relevant</b> 3:7 21:3<br>24:23 50:17<br><b>relied</b> 5:11<br><b>remanded</b> 36:13<br><b>remember</b> 18:18<br><b>reply</b> 32:13<br><b>representing</b> 2:9<br><b>request</b> 30:9<br><b>requesting</b> 30:7 32:6<br><b>requirement</b> 26:18<br>27:15 30:10<br><b>requirements</b> 26:14<br><b>requires</b> 13:18<br><b>rescue</b> 16:18<br><b>respect</b> 9:3,24<br><b>Respondent</b> 26:10<br><b>Respondent's</b> 32:12<br><b>response</b> 4:24 5:7,8<br>14:15 27:11<br><b>responses</b> 51:25<br><b>rest</b> 18:20 28:19,19<br><b>result</b> 8:21 37:7<br><b>results</b> 40:13<br><b>retail</b> 34:11 39:10<br><b>retry</b> 37:1,9<br><b>return</b> 20:13<br><b>RICHARD</b> 1:22<br><b>ridiculous</b> 22:16<br><b>right</b> 5:3,3 6:23 7:10<br>7:10,20,20 8:25 9:21<br>9:23 10:12 11:4,18<br>18:3,11 19:4 22:17<br>23:3,9 26:4 31:23<br>36:21 38:10,10 39:19<br>43:1,14 46:4,7 48:13 | 48:22 49:2,8<br><b>risk</b> 43:12<br><b>ropes</b> 7:19<br><b>roping</b> 6:17,21 12:4<br><b>Ross</b> 26:5,9,10,24<br>27:10 28:17 29:7<br>30:3,6,17,20 31:25<br>32:4,21 33:3,12,16<br>33:20,24 34:7 35:10<br>36:1,7,9,11,18,22,25<br>37:13,24 38:3,12,19<br>39:3,5,16,19 40:8,15<br>40:25 41:5,11,25<br>42:18 43:1,8,15,20<br>43:24 44:7,10,16,25<br>45:2,11,14,22 46:1,5<br>46:9,16,22 47:13<br>48:6,11,13,16,19<br>49:1,3,8,10,16,21<br><b>rug</b> 11:10<br><b>run</b> 10:21 13:25<br><b>running</b> 19:21<br><b>runs</b> 42:11 |
| <b>Q</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | <b>R</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <b>S</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| <b>question</b> 2:20,24 3:1<br>3:17 4:1,12 9:2<br>10:25 11:1,13 12:9<br>14:2,8,9 15:25 17:11<br>17:22 18:1,12,22,25<br>19:1,14 24:13,13,18                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | <b>R</b> 1:22 53:1<br><b>radar</b> 47:12<br><b>rails</b> 18:15<br><b>raise</b> 50:21<br><b>raised</b> 2:15 32:18<br><b>range</b> 5:15,20 46:15<br>46:17,20<br><b>read</b> 4:11,12 22:11<br>24:6 31:3,7,24<br><b>reading</b> 27:6<br><b>real</b> 29:13 34:1 39:17<br>41:9<br><b>reality</b> 46:18<br><b>really</b> 4:10 7:13,15<br>10:22 16:3,3 28:1<br>29:9 31:11 33:17,25<br>34:19 37:15<br><b>reason</b> 12:9,14 13:6<br>36:25 37:2<br><b>reasonable</b> 3:11 25:17<br>29:14,16 37:18,20,25<br>38:1 46:22 49:13<br>50:19<br><b>reasonably</b> 39:6<br><b>reasons</b> 12:10<br><b>rebuttal</b> 2:10 49:20<br><b>receive</b> 13:10,24 28:8<br><b>recipe</b> 23:16<br><b>recitation</b> 9:18 51:20<br><b>recognize</b> 34:2,25 35:3<br><b>recollection</b> 30:21,25<br><b>reconciling</b> 30:9<br><b>record</b> 6:11 8:11,14 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          | <b>sale</b> 20:3,4,4 23:25<br>24:1,7 38:8,23 44:4<br><b>sales</b> 20:16,17 21:15<br>21:15,25 22:24 23:11<br>23:24 24:7,15 25:19<br>25:22 26:1 38:23<br>44:3,24 45:20<br><b>Satava</b> 4:5<br><b>satisfaction</b> 3:10<br><b>saw</b> 34:15 39:12,14,20<br>42:15<br><b>saying</b> 22:11 24:7,11<br>24:19 27:11 28:4,4<br>33:3 43:10,22 44:17<br>45:16 46:14<br><b>says</b> 5:14 6:14 12:2<br>22:2,4 27:7 28:9,25<br>28:25 32:13 37:17<br>38:21<br><b>scheme</b> 16:5<br><b>screen</b> 47:12                                       |

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
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| <b>scrolls</b> 6:18,23 12:5<br><b>sculpted</b> 29:23<br><b>Second</b> 11:11 12:13 51:13<br><b>secondary</b> 3:2 13:10 13:18 15:14,20 16:17 17:5 19:5 26:17 27:1 27:7,17 28:1,7,10,21 29:1,4,5,8 31:19 34:6<br><b>see</b> 6:21,22,23 22:20 28:3,15 29:6,20 35:20 39:17 50:21<br><b>seeing</b> 8:1<br><b>seen</b> 41:1,2,16<br><b>selection</b> 4:2<br><b>sell</b> 20:6<br><b>selling</b> 20:11 34:12,14 34:16 42:2<br><b>sells</b> 35:4<br><b>send</b> 18:16<br><b>sense</b> 22:12 24:8<br><b>sent</b> 18:20 31:21<br><b>sentence</b> 38:14<br><b>separate</b> 15:1<br><b>separately</b> 3:2<br><b>September</b> 53:11<br><b>set</b> 2:10 19:12<br><b>settled</b> 32:11<br><b>shape</b> 6:3,5,6,10 7:21<br><b>shirt</b> 27:20,22 33:8<br><b>shopper</b> 47:7<br><b>show</b> 19:3 20:23 21:1 34:18 39:22 47:25<br><b>showing</b> 31:16 51:5<br><b>shows</b> 35:11 44:3<br><b>side</b> 7:18,18 8:2 12:7 22:2 24:10,10 29:14 38:6<br><b>sides</b> 38:25 41:13 47:1<br><b>significant</b> 40:5 49:6<br><b>silver</b> 3:18 4:6,7 6:18 11:25 14:18,21 15:10 29:23<br><b>silversmithing</b> 12:23<br><b>similar</b> 22:21 47:10<br><b>similarity</b> 2:22 | <b>simple</b> 25:10 35:21<br><b>simply</b> 4:20 16:16 29:8 40:20<br><b>single</b> 27:21,23<br><b>sitting</b> 32:8<br><b>situation</b> 28:14<br><b>Skye</b> 4:17<br><b>small</b> 46:24 50:15<br><b>sold</b> 35:25 38:7,25 42:16<br><b>somewhat</b> 38:5<br><b>soon</b> 44:22<br><b>sorry</b> 36:22<br><b>sort</b> 8:5 10:1 23:19 31:18<br><b>sought</b> 13:22<br><b>sounds</b> 45:5<br><b>source</b> 11:1 13:17<br><b>Southern</b> 1:12<br><b>speaking</b> 15:22<br><b>special</b> 22:20<br><b>specific</b> 28:12<br><b>specifically</b> 5:13<br><b>specification</b> 51:14<br><b>speculate</b> 44:1<br><b>speculation</b> 43:18<br><b>speculative</b> 42:22,24 46:19<br><b>spoke</b> 16:24 30:12<br><b>stand</b> 35:23<br><b>standard</b> 4:23 5:17,23 8:20 17:8<br><b>standing</b> 11:17<br><b>start</b> 21:8 24:25 25:13 25:19 26:11<br><b>started</b> 28:5 32:8 37:23<br><b>starting</b> 8:4 24:2,21 50:17<br><b>starts</b> 22:1<br><b>stated</b> 38:15<br><b>statement</b> 28:12,18 31:4<br><b>States</b> 1:2,12 39:10<br><b>statistics</b> 25:22<br><b>Stetson</b> 2:7,9,14 5:3,8 | 6:8 7:10,17,20 8:3,9 8:22,25 9:14 10:9,12 10:19 11:4,8 13:4 15:15 16:7,11,13 17:21,25 18:3,7,11 19:4,11 21:13,17,19 21:24 23:1,7,10 24:4 24:12,17 25:6,9 26:6 49:19,23<br><b>stick</b> 19:10<br><b>stop</b> 3:4 13:24<br><b>stopped</b> 47:16<br><b>store</b> 34:11 35:10<br><b>stores</b> 39:10<br><b>Story</b> 37:15 38:14 43:9 50:21<br><b>strains</b> 14:1 20:2<br><b>strikes</b> 40:9<br><b>struggling</b> 42:22<br><b>student</b> 25:14<br><b>students</b> 21:8<br><b>studies</b> 47:24<br><b>submit</b> 18:14 52:8,13<br><b>subscribed</b> 53:10<br><b>subsequent</b> 19:18<br><b>substantial</b> 2:22 3:8 11:3 21:3<br><b>substantiated</b> 50:5<br><b>suffers</b> 41:21<br><b>suggest</b> 42:21<br><b>suggesting</b> 24:20 41:12<br><b>suggestion</b> 15:19<br><b>summary</b> 18:5,12,18 35:14<br><b>superfluous</b> 27:15<br><b>supplemental</b> 50:8<br><b>support</b> 17:12 23:3 24:23<br><b>supported</b> 3:7 21:3<br><b>supporting</b> 21:5 50:3<br><b>supposed</b> 41:3<br><b>Supreme</b> 15:24 16:15 24:22 26:14,17 27:12 37:16,21 43:12<br><b>sure</b> 7:17 11:8 13:4 | 16:11 21:12,13 31:5 38:18 39:2,4,4 48:5<br><b>symbol</b> 8:19<br><b>sympathetic</b> 7:7 38:5<br><hr/> <b>T</b><br><hr/> <b>T</b> 53:1,1<br><b>take</b> 6:25 19:17 22:3 23:11 24:21 27:1 40:16,17 48:1,1<br><b>taken</b> 49:6<br><b>talk</b> 9:10 29:10 37:11<br><b>talking</b> 5:19 7:9 10:22 12:16,17 14:22 23:19 25:21 32:24<br><b>taste</b> 35:17<br><b>teach</b> 4:5<br><b>teaches</b> 4:5<br><b>tell</b> 44:9 46:20<br><b>telling</b> 6:14 21:11<br><b>tells</b> 28:25 29:2,3,4<br><b>tend</b> 9:17<br><b>terms</b> 10:24 51:17<br><b>testimony</b> 9:8 12:3 15:9 16:2 19:25 20:15 23:23 24:6 34:10,15 35:6 40:18<br><b>tests</b> 7:13<br><b>thank</b> 2:7,14 26:6 49:17,21,22,23 52:9 52:10<br><b>theories</b> 3:8 22:25 50:23<br><b>theory</b> 20:3,9,10,16 21:5,20 22:2,3,12,18 22:18 23:3,4,6,7,8,12 23:24 24:5,25 25:1,7 42:10,10,20 44:15,21 44:21,24 45:1,18 50:6,8<br><b>thin</b> 2:19 3:21 9:5,10 10:2<br><b>thing</b> 11:23 32:9 41:17 43:4<br><b>things</b> 5:6 6:4,10 7:8 7:18 14:12 16:6 18:5 |
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| 34:18 35:9,11 39:7<br>41:1,16 42:16<br><b>think</b> 2:17 4:10 5:9<br>6:14 7:13,14 8:5,25<br>9:12,14,17 10:4<br>11:12 12:12 15:16,22<br>15:23 17:6,21 19:23<br>22:17 24:11,12 25:4<br>25:10 26:4,20 27:12<br>28:4,21 29:7,16 30:6<br>33:4,6,20 35:13,14<br>37:2 43:8,9 45:16<br>49:11,14 50:2 51:11<br><b>thinking</b> 27:13<br><b>third</b> 3:5<br><b>thorough</b> 9:15<br><b>thought</b> 31:4 34:16<br><b>threatened</b> 52:4<br><b>three</b> 2:17<br><b>threshold</b> 17:4<br><b>throw</b> 15:8<br><b>tile</b> 4:18 9:20,24 10:1<br>11:9<br><b>time</b> 2:16 19:22 26:7<br>30:9 35:11 49:16<br><b>today</b> 51:23 52:11<br><b>told</b> 41:15,16<br><b>top</b> 3:13 15:21 27:8<br><b>total</b> 21:7<br><b>totally</b> 10:15 42:23<br><b>trade</b> 2:23 3:1,3 9:6,22<br>12:17,20 13:2,9,17<br>13:23 14:2,8,11,17<br>14:18,22 15:4,9,21<br>16:18,20,25,25 17:19<br>18:19,25 19:2,13,15<br>26:3,15 27:8 28:23<br>29:3,9,19 31:16<br>34:18 37:5 48:15,16<br>51:4,15,22,24 52:1<br><b>trademark</b> 13:10 14:3<br>14:6 15:17 26:22<br>27:3 28:8,11 33:14<br>38:16 43:10<br><b>transaction</b> 35:12<br><b>transactions</b> 50:11,15 | 50:16<br><b>TRANSCRIBED</b> 1:24<br><b>transcript</b> 31:11,24<br>53:4<br><b>translate</b> 13:14<br><b>trial</b> 14:21 19:8 51:21<br><b>tried</b> 30:4<br><b>trim</b> 29:22<br><b>trouble</b> 35:23 45:8<br>48:3<br><b>true</b> 8:4,9 10:9 15:15<br>53:4<br><b>try</b> 2:13<br><b>trying</b> 14:10 16:2<br>31:10,11 47:19<br><b>Tufenkian</b> 11:11<br><b>Tugboat</b> 20:22 50:22<br><b>tuition</b> 21:7 25:13<br><b>turn</b> 20:17,18 40:1<br><b>two</b> 2:23 8:13,15 14:19<br>14:25 17:9 20:1<br>22:25 33:10 34:22<br><b>types</b> 23:20 | 11:19,21<br><b>unprotectable</b> 4:13,21<br>5:21 15:17<br><b>unusual</b> 10:15<br><b>upheld</b> 18:23<br><b>upper</b> 26:22<br><b>USC</b> 21:7<br><b>USC's</b> 25:14<br><b>use</b> 4:25 14:11 49:12<br><b>usually</b> 17:24 18:1<br>32:23 47:23<br><b>utterly</b> 15:6<br><b>U.S</b> 26:13,17 27:12<br>37:21                                                                                                                                         | <b>wanted</b> 31:17<br><b>wasn't</b> 22:18 45:22,24<br><b>way</b> 4:17 17:13 19:18<br>21:6 28:12 30:13<br>31:9 32:4 40:5 46:3<br><b>ways</b> 4:16,19 5:5,22<br>6:2 23:13 25:2<br><b>wear</b> 36:23<br><b>wearing</b> 27:20<br><b>went</b> 18:15,24,24<br><b>we'll</b> 26:4 31:2 49:19<br>52:12<br><b>we're</b> 5:19 7:8,8,9 8:7<br>8:8 10:22 11:13<br>24:19 41:3 42:22<br>47:19<br><b>we've</b> 2:15 11:14<br><b>white</b> 27:20 33:8<br><b>WILLIAM</b> 1:21<br><b>wiped</b> 37:5<br><b>witness</b> 15:9<br><b>witnesses</b> 14:22 16:24<br><b>women</b> 42:4<br><b>wondering</b> 16:5<br><b>word</b> 13:13 14:4,5,6<br><b>words</b> 7:8,12 8:5<br>10:21,22 43:11,21<br><b>work</b> 3:15,22 4:6 7:1<br><b>worked</b> 32:4<br><b>world</b> 15:17<br><b>wouldn't</b> 15:11 33:1<br><b>wrong</b> 25:5 30:25<br>32:24 50:18<br><b>Wunderlich</b> 20:2<br>23:10 46:13,23 50:7<br><b>Wunderlich's</b> 19:24<br>23:2,23 46:11 50:23 |
|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <b>U</b><br><b>ubiquitous</b> 40:22<br><b>ubiquity</b> 40:23<br><b>UCLA</b> 21:9<br><b>UCLA's</b> 25:13<br><b>UCLA/USC</b> 25:11<br><b>Uh-huh</b> 6:8 8:3 42:18<br>43:24<br><b>unauthorized</b> 5:16<br><b>unconnected</b> 42:9<br><b>undergraduate</b> 25:14<br><b>underlying</b> 7:12<br><b>understand</b> 7:23<br>21:12 27:10 28:17<br>40:10,21 41:7 45:16<br><b>understanding</b> 32:5<br>35:24<br><b>understood</b> 27:2<br><b>unintelligible</b> 5:10<br>24:1 36:8<br><b>United</b> 1:2,12 39:10<br><b>unoriginal</b> 3:15 11:17     | <b>V</b><br><b>v</b> 1:8<br><b>value</b> 24:16<br><b>various</b> 14:21<br><b>verdict</b> 19:18 50:24<br>51:18<br><b>versus</b> 4:5 52:13<br><b>view</b> 27:5 33:14 37:14<br>40:15<br><b>viewer</b> 7:25<br><b>viewings</b> 40:13<br><b>violation</b> 38:8<br><b>vir</b> 7:6<br><b>virtual</b> 4:22 5:18,24<br>9:11 11:3<br><b>virtually</b> 4:8 7:4,24<br><b>visual</b> 7:9 8:8 10:22<br>12:11 13:14<br><b>vodka</b> 4:17<br><b>Vuitton</b> 41:21,21 | <b>Y</b><br><b>yeah</b> 8:8 21:23 30:23<br>31:1 32:4 35:18<br>36:16,17,21 37:22,24<br>39:16 41:5 42:13,25<br>44:25 45:2,11 46:5<br>48:6 49:3,10<br><b>year</b> 35:5 47:19                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |

ORAL ARGUMENT - 1/13/2011

Page 11

|                              |                       |  |  |
|------------------------------|-----------------------|--|--|
| <b>years</b> 6:19 27:2 47:17 | <b>278</b> 20:6 21:20 |  |  |
| <b>Yurman</b> 51:12 52:4     | <b>286</b> 20:1 50:7  |  |  |
| <b>Z</b>                     | <b>3</b>              |  |  |
| <b>Zanger</b> 9:16 11:10     | <b>300</b> 35:4       |  |  |
| <b>\$</b>                    | <b>5</b>              |  |  |
| <b>\$400</b> 35:4            | <b>50</b> 39:11       |  |  |
| <b>0</b>                     | <b>6</b>              |  |  |
| <b>0</b> 2:5 52:14           | <b>6</b> 22:4         |  |  |
| <b>06-CV-1848-H(POR)</b>     | <b>6420</b> 1:25      |  |  |
| 1:13                         | <b>7</b>              |  |  |
| <b>09-55624</b> 1:4          | <b>7</b> 22:4         |  |  |
| <b>09-56038</b> 1:4          |                       |  |  |
| <b>1</b>                     |                       |  |  |
| <b>1</b> 40:4                |                       |  |  |
| <b>1-to-1</b> 21:24 22:12    |                       |  |  |
| 38:7                         |                       |  |  |
| <b>1.7</b> 20:17 35:8,11     |                       |  |  |
| <b>10</b> 35:7 39:25         |                       |  |  |
| <b>1139</b> 5:12             |                       |  |  |
| <b>115,000</b> 20:6,16 21:15 |                       |  |  |
| 50:11                        |                       |  |  |
| <b>117</b> 13:8              |                       |  |  |
| <b>12</b> 35:7 39:25         |                       |  |  |
| <b>120</b> 39:9              |                       |  |  |
| <b>13</b> 1:17 2:2           |                       |  |  |
| <b>13,000</b> 40:2           |                       |  |  |
| <b>147</b> 50:25             |                       |  |  |
| <b>1771</b> 50:9             |                       |  |  |
| <b>18th</b> 53:11            |                       |  |  |
| <b>19</b> 30:15              |                       |  |  |
| <b>1931</b> 37:15            |                       |  |  |
| <b>2</b>                     |                       |  |  |
| <b>2</b> 39:24               |                       |  |  |
| <b>20,000</b> 22:5           |                       |  |  |
| <b>2007</b> 9:19             |                       |  |  |
| <b>2011</b> 1:17 2:2         |                       |  |  |
| <b>2012</b> 53:11            |                       |  |  |
| <b>236</b> 6:11              |                       |  |  |
| <b>237</b> 6:11              |                       |  |  |
| <b>271</b> 8:14              |                       |  |  |
| <b>274</b> 19:25 50:7        |                       |  |  |
| <b>276</b> 20:6 21:19        |                       |  |  |

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 808 Wilshire Boulevard, 3rd Floor, Santa Monica, CA 90401.

On September 28, 2012, I served true copies of the following document(s) described as **SUPPLEMENTAL DECLARATION OF DAVID W. SWIFT IN SUPPORT OF DEFENDANT NHW'S MOTION FOR SUMMARY ADJUDICATION AS TO PLAINTIFF'S LOST PROFIT DAMAGES** on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

**BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on September 28, 2012, at Santa Monica, California.

/s/ Nikki R. Shlosser  
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